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LOCAL GOVERNMENT LAW

TEXT, CASES & OTHER MATERIALS

By

JEFFERSON B. FORDHAM

Dean of the College of Law and Professor of Law, The Ohio State University

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PREFACE

WHEN, in his first year as a law teacher, the author was assigned the course in Municipal Corporations, it was not from choice. It did not take long, however, for him to develop a live and durable interest in the field. From the standpoint of legal education, he has long since observed that local government law has a number of significant characteristics. To cite a few: (1) It is "grass roots" law; it is close to the people and the lawyers who serve them. (2) It is big and pervasive, yet large areas of the field are ignored or receive, at best, nothing more than tangential treatment in other law school courses. (3) It is to a peculiar degree among public law areas, lawyer's law; local government, in matters of organization, substance and procedure, is uniquely subject to judicial scrutiny and effective means of correction. (4) The expansion of local governmental activity and the growing complexity of urban and suburban life generate legal questions challenging to the best minds.

This book has been prepared on the assumption that the conventional course in municipal corporations has been too narrowly projected at the expense of ad hoc and non-urban general function units, that it has dealt with municipal organization, powers, procedures and responsibilities more or less in the abstract and without stress upon functions and objectives, that certain substantive areas, such as finance, personnel, intergovernmental relations and local lawmaking, have not received adequate attention. If those assumptions are valid, it is high time that we attempt a fresh approach. This book is put forth, with some diffidence, as such an attempt.

The title "Local Government Law" has been used because it is considered descriptive of the subject, not as a mere exercise in relabeling old wine. While the meaning to be ascribed to the term "municipal corporations" as used in various provisions of positive law is far from constant, the more common usage is to apply the term simply to incorporated urban communities. The concern in this study is with the legal problems encountered in the conduct of government at the local level without any predetermined stress upon any particular type of local unit. "Public Corporations" is not apt because we have public corporations at the national and state levels and because we have local units of importance, such as counties in Florida, which are not endowed with corporate capacity.

PREFACE

The author's approach has been, at the outset, to provide rather thorough orientation in the field, first, in terms of the historical context and the broad aspects of structure and objectives of local government and, second, in terms of intergovernmental relations as well as technical organizational and procedural matters, and, thereafter, to attack community planning and development and other advanced special topics. There has been a conscious effort to make use of the splendid opportunities which the materials of local government law provide the teacher in relating law both to policy and to practical administration. There has not, however, been any attempt at complete coverage; the field is too immense and the author is more interested in the development of insights into local governmental institutions and processes and of skills in attacking the legal problems of local government than merely in imparting a mass of information.

One substantial exclusion should be noted. No special consideration of local administrative law has been undertaken. It is thought that administrative law problems at the local level are not so peculiar as to mark them out for extended special treatment apart from a general course in administrative law.

Local government law is likely material for the problem method in teaching. It is hoped that this book will be found not unadapted to that technique. The author has, however, deliberately refrained from developing the materials around factual problems spelled out in the book. Such problems would not be fresh after one round of teaching in a given school. The individual instructor, moreover, can fashion problems suited to the legal and governmental environment in which he is working.

A material modification of the case system has been attempted. The author's own text makes up roughly one-third of the volume. There is simply no point to adhering strictly to the case system in an advanced course of this character. Cases have been used freely (1) to bring out the judicial approach to a problem. (2) where they have been particularly provocative on their facts, and (3) where the opinions have unusual interest as legal essays. Usually the facts constitute the most significant element of a case. This has been kept in mind and a studied effort has been made to avoid "mangling" a case in the editing process. In including his own text the author has thought: (1) that more often than not the student should be oriented in a topic rather than thrown, uninitiated, into the refinements of it and that the best way to do this is by compact text-writing, (2) that text may effectively be used for grounding students in the more crystallized part of a subject and in those matters generally

PREFACE

which lay no heavy tax upon the understanding, and (3) that the author of such a book should be free to offer, with all possible objectivity, such critical commentary as his work in the field may have generated. Perhaps this approach will give the volume some utility beyond its primary pedagogical function.

A considerable amount of illustrative material has been included. Conspicuous in this category is a municipal bond transcript, which provides a concrete frame of reference for analysis and explanation.

Resort to footnotes has been minimized for very practical reasons. If a point is worth developing, even in a limited fashion, it should be physically presented in a way which will command student attention. In teaching materials, moreover, there is not the occasion for documentation which exists with respect to treatises.

The allocation of class hours to courses is, of course, a relative matter. It is the opinion of the author that if justice is to be done local government law, at least forty-five hours should be devoted to the subject. This volume is best suited to a sixty-hour pattern. It is, however, subject to adaptation. Some choice can be exercised as to topics and cases within given divisions of material. It will be noted, too, that text and illustrative matter exaggerate the length of the book.

Most of the cases reproduced here are of very recent date. Their choice has been rested on the dynamics of the subject matter. This is not to ignore the past; in recent cases the experience of earlier years is brought to bear upon the living problems of our time.

While this volume is the fruition of years of effort the author nourishes few illusions about its "definitiveness." He has strong convictions about the philosophy upon which the undertaking is grounded. It remains for others to say, granting the soundness of the general plan, whether the execution has been effective. Much will have been accomplished if the book has a share in widening student perspective and in quickening interest in the important subject with which it deals.

JEFFERSON B. FORDHAM

Columbus, Ohio March 1, 1949

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THE author gratefully acknowledges his general debt to all those before him who have labored in this field. He conveys his warm thanks to those who have graciously permitted reproduction of all or substantial portions of other publications. Specifically. he thanks the International City Managers' Association for a table showing the organization of local employees in cities of over 10,000, which appeared in the Municipal Year Book 1947, and for a quotation from Local Planning Administration (2d ed. 1948): the Bureau of Planning of the Department of Commerce of the State of New York for a quotation from the Bureau's publication "Local Planning and Zoning"; the Municipal League of Seattle. Washington, for a memorandum to the city planning commission concerning certain proposed annexations; and the Columbia and North Carolina Law Reviews for excerpts from certain articles. He is grateful to the City of Warwick, Rhode Island, and to the City of Phoenix, Arizona, for making available copies of their zoning ordinances, which have been reproduced in whole or part in this volume. He is deeply indebted to Messrs. Reed Hoyt & Washburn, municipal bond counsel, New York City. for furnishing a photostatic copy of the transcript of proceedings relating to an issue of \$300,000 Water and Sewer Bonds of the Town of Landis, North Carolina, which he has reproduced in full.

For vital support and encouragement in the early stages of this venture the author is durably grateful to his former dean and long-time friend, Paul M. Hebert of Louisiana State University. In his researches he was given valuable assistance by Mrs. Margaret Taylor Lane, formerly librarian of the Law School, Louisiana State University, Mr. Emmett H. Proctor of the Nash-ville Tennessee Bar, and Mr. W. T. Mallison, Jr., of Seattle, Washington. Mr. Burton Stevenson and Mr. James Lynn, recent graduates of the College of Law of The Ohio State University, assisted materially by verifying citations.

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LOCAL GOVERNMENT LAW

Chapter 1

TYPES AND OBJECTIVES OF LOCAL GOVERN-MENTAL UNITS

SECTION 1. HISTORICAL NOTES

The student of local government law should have some appreciation of the historical context of American local government. The historical materials in the field are of more than common importance. Our local governmental institutions are the product of a complex evolutionary process. One must study that process if he is to understand the institutions. This troubled atomic age may seem immeasurably distant from the simple, relatively static era of the Middle Ages. People are thinking today of such problems as urban replanning designed to reduce vulnerability to attack with atomic bombs. The nexus, however, is there. We are simply put to it to retain our sense of proportion. While it would entail broad reading to acquire a thorough grasp of the subject, perhaps enough can be said in the necessarily brief notes which follow to afford some historical perspective.

A. ENGLISH LOCAL GOVERNMENT

At the time of the Norman Conquest England was divided into shires or counties. Within a county the basic unit of local administration was the township, which might be the smallest subdivision of the free community or a dependent colony on the estate of a great proprietor. "The union of a number of townships for the purpose of judicial administration, peace and defense, formed what is known as the 'hundred or wapentake' . ." 1 Stubbs, Constitutional History of England 103 (6th ed. 1897). Taswell-Langmead, English Constitutional History 13 (6th ed. Ashworth 1905). In some districts the shires were divided into wards. Urban life was scarcely in its infancy. The Anglo-Saxon "burh", the forerunner of the English borough, was but a more developed township; it might have a stronger mili-

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tary situation. The larger towns might contain several townships and thus resemble the hundreds in organizations. For generations after the Conquest, the boroughs, like the rural villages were, as Maitland observed, "cast in an agrarian mold." Society was organized upon a communal pattern entirely innocent of any notions of corporate personality. The situation has been described with a characteristic Maitland touch, as follows: ". I imagine that in the old days the community was too automatic to be autonomous, too homogeneous to be highly organized, too deeply immersed in commonness to be clearly corporate, too plural to be legal unit, too few to be one." Maitland, Township and Borough 36 (1898). There was at most, an incipient manorial system at the end of the Anglo-Saxon period. The power of king or lord was associated with the person and personal relationships. Governmental or political power (dominium) and ownership (proprietas) were not delineated. Governmental powers and offices were dealt in as property. This tended toward the creation of ill-defined private jurisdictions. Thus it was that the Normans found the local jurisdictions in England in a state of hopeless confusion. 1 Holdsworth, History of English Law 24 (4th ed. 1927).

The Normans contributed a much clearer conception of tenure and incidents of tenure. They viewed the tenant as one holding derivatively, one who got his land from his lord on terms of feudal service. This strengthened the position of the lord at the expense of the old communal units. Tenure gave him private jurisdiction over his tenants, the right to hold a court for them. In these ideas lay the hierarchal germ of great feudal provinces. But such a development was forestalled by the Norman and Angevin kings, who scattered the holdings of the Norman barons and maintained the vitality of the communal jurisdictions.

The development of a national common law we owe to the rise of a system of royal courts, superimposed upon the old communal jurisdictions. The expanding jurisdiction of those courts and superior quality of their justice tended to obviate need for the private jurisdiction of feudal courts, of which the manorial courts became the most common variety, and to narrow the judicial work of the communal courts.

It should be borne in mind that in those early days the functions of government were largely undifferentiated. Actually, although organized along lines, which in later times have been regarded as judicial, such agencies as the county and hundred courts were governing bodies as well as tribunals. Even the manorial courts performed administrative as well as judicial functions. They could make "byelaws" for the government of

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their communities and the regulation of the common field system of agriculture. 1 Holdsworth 185.

The royal hand of the king reached into local government soon after the Conquest. The sheriff became the crown representative in a county. The increase in his power paralleled that of the king, until he became the virtual ruler of his county, superior in rank even to the nobility. His manifold responsibilities embraced tax administration, conduct of jails, execution of process of the king's courts, service as presiding officer of the county and hundred courts and the exertion of both military and police authority in defense against enemies of the crown and keeping the peace.

The hundred courts, like the county courts, were governing bodies as well as tribunals, but unlike the latter, they were of minor importance. It is significant, however, that there grew out of the hundred court a separate court known as the sheriff's tourn, or turn, (referrable to the sheriff's turn around his county to check upon the conduct of affairs) which employed a machinery of presentment by jury from which stemmed the procedure of presentment and indictment later used by the justices of the peace in punishing offenders and governing the county. tion should be made at this point of another office, which, like that of sheriff, has had a long history and survives today both in English and American local government. The office of coroner probably dates from the twelfth century. Throughout the two centuries which followed there were usually four coroners for each county. They were elected in the county court. system of selection was unique; no other local officials were elected. The office was created to protect the financial interests of the crown in such matters as fines accruing to the crown out of the administration of the criminal law. (Note that the very title stems from "crown".) The coroner might summon a jury and conduct an inquest, as to various matters, whether unexplained death, treasure trove, or what not, with a view to protecting the rights of the crown. In time, many of his duties became obsolete. The important function of conducting an inquest in case of unexplained death survives, not, of course, to safeguard the pecuniary interests of the government, but in aid of the administration of justice.

The decline of the power of the sheriff was a process which spanned several centuries. His ultimate eclipse as ruler of the county came about in the sixteenth century when his military authority passed to a new royal officer for the county, the lord-lieutenant, and his wide powers of local administration were transferred to a new governing body of the county, the justices of the peace for the county assembled in quarter session. By

statute of 1553 the sheriff was made ineligible to be a member of that body. The crown had long since come to view the power of the sheriff with suspicion and legislation had been enacted which provided for the service in each county, under commissions from the crown, of conservators or keepers of the peace empowered to hear and punish offenders. In 1363 they were commanded by statute to hold their sessions four times a year. The title "justice of the peace" dates from that period. Thereafter a long outpouring of statutes heaped police, judicial and administrative duties upon the justices, some to be performed by one or more justices and others by the body of justices of a county assembled in quarter session.

Stubbs has remarked that the old county court had all the elements of a local parliament. In full session it was a general assembly of the freeholders representing nobility, clergy and commons. Stubbs, Constitutional History of England 215 (6th ed. 1897). It continued to be an important body until the rise of Parliament tended to transfer to the central body the governing powers of the county court and the rise of the court of quarter sessions took away much of the local governing authority of the county court and tended to confine it to judicial business. (It did not administer royal justice and thus was not a court of record).

Constables early occupied positions of importance in English local government. High constables were the executive agents of the hundreds and petty constables of the townships. As those institutions decayed the constables came to be executive agents of the justices of the peace and served as representatives, even as the heads, of the civil parishes, which in time largely replaced the older communities of manor, township and hundred.

We have seen that the justices of the peace came to have manifold duties, which they endeavored to perform under judicial forms of procedure. It is obvious that such machinery was ill-adapted for the conduct of public administration of any complexity. The business of government had expanded. The power to punish failures in administration was not enough. There was need of continuous, positive agencies of administration to levy taxes, look after the poor, maintain highways and perform other functions. The secular or civil parish was the unit developed to supply this need. Legislation under the Tudors made the parish the primary local unit of government.

Originally the parish was probably a wholly ecclesiastical unit. The secular parish was a post-Reformation development arising from the new relation of Church and State effected by statutes of Henry VIII and Elizabeth. The conversion of the

parish to secular business, begun by a poor law of 1536, was completed by Elizabethan poor laws. The machinery for parish administration erected by these laws covered the business of levying and collecting rates for poor law purposes. Soon the parish was being used in the administration of taxes imposed for other purposes. The urban parishes exercised the same powers in the boroughs as were exercised by the rural parishes in the country. Odgers, Local Government 39 et seq. (2d ed. by Odgers and Naldrett 1907).

Thus far, we have been considering the evolution of English local government in general without particular reference to urban life. It is time to give heed to the rise of urban government.

The early borough community closely resembled the village community. Like the village, boroughs were organized on a self-sufficient agrarian basis; they even had fields. They also had in them, however, differentiating elements of urban life, that is, their markets and their positions as military and political centers of the counties. So long as the agrarian pattern persisted hazy communal ideas underwent little refinement. The transition of a borough from a community dependent upon the land to a populous center dependent upon trade and manufacturing would, on the other hand, stimulate the development of legal ideas. Thus, there was an almost parallel transition from community to corporation.

Long before the corporate concept emerged in the fourteenth century the boroughs had acquired special privileges, usually for a consideration, which assured them a measure of independence in administering their own affairs. In short, they obtained from their lords charters granting various franchises and liberties. The result was the creation of a franchise jurisdiction, which unlike the feudal manorial jurisdiction, was to have lasting importance. Most of the important boroughs did not pass through the manorial phase; the king was their lord.

Maitland, with an eye all the while to a community's relation to land, formed the opinion that "a true corporate ownership of land" first sharply severed itself "from the old nebulous community" when it came to be recognized that common land of a borough could be leased and thus removed from use in common and the rental used for the good of the borough. Maitland, Township and Borough 84 (1898). At all events, corporateness gradually emerged; it was not consciously applied as by borrowing from Roman law.

It has been thought that the charter granted by Henry VI to Kingston-on-Hull in 1439 was the first definite municipal char-

ter of incorporation. Maitland and other scholars, however, were convinced that the ancient boroughs of England were corporate somewhat earlier. Once the corporate idea had emerged formal language of incorporation was no sine qua non. The corporate franchise lay in grant and the existence of the grant could be confirmed by prescription.

Of great significance is the fact that the old borough charters were more grants of franchises and liberties than local constitutions. This left play for the actual fashioning within a borough of a constitution of its own. The result was the enjoyment of a large measure of local autonomy and great variety in the structure of borough government. Even so a fairly typical municinal governing body, the council, was developed. It consisted of a mayor, who presided, aldermen and assistants or common councilmen. They all sat together as one body. The mayor and aldermen were also justices. In many boroughs members of the council held office for life and the survivors filled vacancies. In London and other populous boroughs, however, they were elected by the freemen, the aldermen in some instances for life and the councilmen for short terms. The status of freemen was intimately tied to the merchant and craft guilds, which tended to dominate borough government. While the status of freemen could be acquired by birth, gift or purchase, it was generally obtained by guild apprenticeship. The freeman was simply a person with the right to trade. 3 Stubbs. Constitutional History of England 596 (5th ed. 1903).

Holdsworth has said that the preservation both in the boroughs and the country at large, of the idea of local autonomy, subject only to the control of the law, was "a unique phenomenon in Western Europe, of the utmost significance for the future of our constitution and our law." 4 Holdsworth 136–7.

Other important mediaeval survivals in local government were the medieval machinery of presentment, unpaid public service by members of the community, the exercise without differentiation of wide powers of government, and judicial control as the means of maintaining the supremacy of the law.

The influence of these institutions and ideas in American local government is apparent. We have kept alive the spirit of local self-government. It has survived despite too-prevalent corruption, inefficiency and popular apathy. Much more conspicuous is the rôle of the courts in reviewing the conduct of local government. To active and all-but-pervasive judicial control we owe the bulk of that immense volume of lawyers' law, which may appropriately be termed local government law. The importance of the rôle played by the courts could hardly be overstressed.

It is vital in the determination of the relations of local units of government one to another, to the state and federal governments and to the individual.

It is not to be supposed that local autonomy was never in jeopardy. Under the Tudors the central government exerted rather strict control over local government. It was the representatives from the boroughs, moreover, who provided the strongest opposition in Parliament to the crown. The growing power of Parliament inspired such royal counter-measures as the planting of subordinates in the cities with the object of gaining control of city government. The king, moreover, invoked the principle, enunciated by the common law judges, that no corporation was valid without royal sanction. This leverage enabled him to impose conditions favorable to his control in cases in which royal grants or confirmations were necessary. In 1683 Charles II had the charter of London forfeited on frivolous grounds in a quo warranto proceeding.

After the Great Rebellion of 1688 Parliament continued to heap responsibilities upon local agencies of government, but centralized control of local governmental administration waned. While this was in keeping, no doubt, with the spirit of local autonomy, it was unfortunately the fact that the quality of local administration deteriorated. In the eighteenth century the growth of urban communities and the growing complexity of the economic life of the country, heightened by the industrial revolution, both increased and complicated the responsibilities of government. In those circumstances the inadequacies of local administration became particularly conspicuous. One change wrought by general legislation under pressure of these conditions was the separation of the judicial and administrative functions of the justices of the peace; the old judicial machinery had, for administrative purposes, become obsolete. To overcome the deficiencies there was extensive resort to local legislation granting special powers with respect to particular problems and to ad hoc agencies. Both of those devices are much in evidence in the present American scene, especially the ad hoc or special function agency. (It is not to be supposed that the ad hoc device was a new invention. Many of the regular organs of government had an ad hoc origin in the mediaeval period. That process has repeated itself in England. There are those who think that the time is ripe for the functions of such agencies to be absorbed by the regular organs at the county level in this country.) The principal functions served by the eighteenth century ad hoc agencies were drainage of low-lying coastal areas, poor relief. highway maintenance and construction and maintenance of

urban improvements such as paving, lighting and sewers. Sidney and Beatrice Webb, Statutory Authorities passim (1922).

Out of the activities of the ad hoc agencies grew important regular functions of the modern municipality. From those agencies, moreover, the municipalities got the idea of maintaining a paid administrative staff instead of relying simply upon the unpaid services of members of the community.

In summing up the strong and weak points of local government in eighteenth century England, Holdsworth listed four elements of strength. (a) The system safeguarded, by ample means of judicial recourse, the rights and liberties enjoyed both by individuals and the units of local government. (b) The system stressed the duties of citizens rather than their rights. (c) The autonomy of local bodies and officers left no doubt as to their responsibility for success or failure. (d) Local government was cheap. The weak points he noted were: (a) Local autonomy was excessive; there was too little central control even as to matters of more than local concern; (b) the old machinery was quite inadequate for the growing urban and suburban communities and the liberal resort to ad hoc agencies was but a piecemeal and complicating attack upon the problem; and (c) economy went too far: public services were too meagrely financed to be adequately rendered. 10 Holdsworth 332 et sea.

It is not suggested that English local government was very democratic. The structure of society was a class structure; one enjoyed the rights and liberties of his class. In the country important offices, such as justice of the peace, were almost always held by the landed gentry; in the boroughs the more substantial trade and commercial figures dominated the scene. In many boroughs members of the council held office for life and vacancies were filled by coöption, the device of selection by the surviving members. Notorious "rotten boroughs" continued to enjoy representation in Parliament.

The development of local institutions in England had been spontaneous and quite unsystematic. It might almost be described as a haphazard process of evolution. This is in keeping with the English character. Lack of logic and symmetry was not disturbing so long as the institutions worked fairly well. Odgers, Local Government 19 (2d ed. by Odgers and Naldrett 1907). The time came, however, as we have seen, when they ceased to function acceptably.

At the end of the eighteenth century reform was overdue. It did not come until the 1830's. The Reform Act of 1832 disfranchised many rotten boroughs and ended other political

abuses associated with the boroughs. A Royal Commission, appointed in 1833, made a searching study of municipal organization and administration which led to the enactment, in 1835, of the Municipal Corporations Act (5 & 6 Will. IV, c. 76). That statute ushered in a new day in municipal government. It put an end, in practical effect, moreover, to the concept that corporate franchises emanate from the crown. Thenceforth municipal government was to be regulated wholly by statute. In the country, however, major reform was to come much later. It was achieved by the enactment of the Local Government Act of 1888 (51 & 52 Vict., c. 41), which gave each county a representative governing body called the county council and carried over into county government many features of municipal organization.

Great stress has been laid upon corporate objectives of the seventeenth and eighteenth century municipality, as distinguished from governmental purposes. Thomas H. Reed, Municipal Government in the United States 60 (Rev. ed. 1934). It is true that for a long time no distinction between public and private corporations was made. That was so in colonial America. It must be remembered, however, that differentiation of governmental functions and purposes came about slowly. Thus, the distinction between judicial and administrative functions was slow in emerging. The boroughs did freely promote facilities such as markets and wharves, calculated to stimulate trade and commerce, but it is hardly safe to say that those objects were not governmental.

Probably the most comprehensive series of works on English local government is that of the celebrated Sidney and Beatrice Webb (Lord and Lady Passfield). The titles of their studies are as follows:

The Parish and the County (1906).
The Manor and the Borough (1908).
Statutory Authorities (1922).

English Poor Law Policy (1910).

The Story of the King's Highway (1913).

English Prisons under Local Government (1922).

The History of Liquor Licensing in England (1903).

B. AMERICAN LOCAL GOVERNMENT

It was but natural that the colonists should bring with them to America English ideas of local government. Even that indigenous institution, New England town meeting government, bore certain resemblances to manorial government, and some to

open vestry parish government in England, as distinguished from the more common closed vestry institution which perpetuated control in a select group.

County organization was introduced early in the colonial period. In New England, Massachusetts took the lead. In that colony counties were established in the 1640's. The provincial charter of 1691 provided for county organization modeled on the English pattern. Counties were created in Rhode Island, as in the other colonies, but were not organized as units of local government. Connecticut developed an important new institution, that of public prosecutor. Provision was made for an attorney in each county to prosecute offenders.

New York contributed a notable democratic innovation in 1691. Elective county boards of town supervisors were created to levy and administer taxes for county purposes. The boards were made up of elected freeholders, one from each town or township. This type of body survives to the present time in several states. It serves, today, of course, as the county governing body with greatly enlarged powers.

In Pennsylvania was born county commissioner government, which in time, placed county administration in a small board of commissioners elected at large. Town or township government was not strong in Pennsylvania as in New York.

Virginia followed the mother country very closely but the plantation system was not conducive to the development of lesser units and the county became the basic unit in local government. Maryland, originally a charter colony, early borrowed the hundred and manor institutions, but in the later colonial period the county and parish framework prevailed.

Settlement came later in the Carolinas, much later in Georgia. Thus, their colonial experience in local government was limited. As in other colonies, however, English influences were early in evidence in the Carolinas.

During the colonial period urban growth was too meagre to stimulate much development of municipal government. Charters of incorporation were granted in a score or more of instances, but roughly one-third of them were of short duration. The governor was the source of all but one of the charters. He acted, apparently, as a representative of the crown. In 1722 the South Carolina legislature created Charles City by a charter, which, on protest of the inhabitants, was annulled by the lords in council a year later.

Most of the colonial assemblies did not let the theory that incorporation was a crown prerogative deter them from passing laws regulating the affairs of municipalities once established. Such legislation dealt with governmental structure, local police, public improvements and finance. Since none of the early charters granted extensive taxing powers for local purposes, resort to supplementation by statute was common. In those days the principal sources of municipal revenue were not direct taxes but fines, license fees and revenues from markets and other facilities. Today, of course, the general property tax is the mainstay.

English borough government was the model for colonial municipal organization. In a few instances, conspicuously that of Philadelphia, a close corporation was established.

Valuable compact treatment of the colonial period will be found in Fairlie and Kneier, County Government and Administration c. 2 (1930); Fairlie, Essays on Municipal Administration c. 4 (1908); Reed, Municipal Government in the United States c. 5 (Rev.ed.1934); and McBain, "The Legal Status of the American Colonial City" 40 Pol.Sc.Quar. 177 (1925).

Probably the most significant feature of the first state constitutions was the dominant rôle assigned to the legislatures at the expense of the chief executives. The effect upon local government was of great importance. Thenceforth, legislative control over the structure and powers of local government was complete, except as expressly limited by the state constitution. Such limitations were to be the contributions of a later day. This meant, of course, complete legislative control over the granting and amending of municipal charters.

There were no radical changes or innovations immediately following the Revolution. A tendency toward the exercise of larger local influence in the selection of county officers was discernible but direct election did not become widely established until the third and fourth decades of the nineteenth century.

Settlers moving westward transplanted the local institutions of the older states into the newly occupied areas. So it was in the Northwest Territory. The New York form of county governing body, built upon town or township representation, was adopted in some areas and the Pennsylvania commissioner form spread to the middle west and to some of the southern states. The lesser township unit for local administration was widely adopted in the northern and central states but the county remained the primary unit in the south. Constitutional revision after 1840 greatly extended the principle of popular election of local officers. Decentralization went to great lengths both in the sense of shifting control from the state to the local communities and that of splitting up administrative responsibility at the local level. Property qualifications for voting were giving way. By 1860 universal manhood sufferage (for whites) was the rule in state and local elec-

tions. The county pattern covered the country. As for lesser units the towns flourished in New England and township government prevailed in the central and midwestern states, while in the south, there were merely districts or precincts for election and judicial purposes. In the western states most of which came onto the national scene after the Civil War, great emphasis was laid upon the county unit and the township was little favored.

The story of American municipal government in the nineteenth century forms a gloomy chapter in our national history. The period witnessed enormous growth both in number and size of urban communities. There was, however, no progress in the development of municipal government to match this growth. Municipal organization was strongly affected by popular antipathy to concentration of authority. There was a tendency to imitate the organization of state government, particularly in applying the idea of checks and balances. This was evident as early as 1789, in the case of Philadelphia. The city's charter of that year created a bicameral governing body and the mayor became an independent executive without membership in either branch of the council. The Baltimore charter of 1796 also embraced the bicameral system and introduced the executive veto into municipal government. Bicameralism was tried later by other large cities. For the most part the position of the mayor was a weak one. The tendency, as in state and county government, was to decentralize administrative responsibility. Jacksonian democracy and the long ballot accentuated the trend. The process of diffusion of function and responsibility carried so far as to place such departments as police and fire under independent board or commission administration. The complicated system thus constructed bred irresponsibility, political interference, inefficiency and corruption.

The old English theory of unpaid amateur performance of local governmental business continued to exert strong influence in American city government during most of the nineteenth century. The large cities, in time, were literally forced by the necessities of the situation to resort to paid professional service. It was a new illustration of the point that personnel, more than structure, is the key to good administration. The lesson has not been adequately learned in local government, especially county and township government, even to this day.

During the first half of the nineteenth century municipalities came to be the objects of very active legislative "tinkering". We have already noticed the legal basis for this sort of action. Charters were granted and amended by special act. In addition, a growing amount of local legislation as to municipal affairs, which was not in charter form, was enacted. It, in time, attained

immense volume. Yet, only the crudest procedures were developed in dealing with local legislation. If the representatives from the district affected were for a local measure that was (and in some states still is) usually enough. It was the log-rolling type of reciprocity—"You vote for my bill and I will vote for yours." Thus, there was no effective legislative sifting and consideration even of the well-intended measures. Political influence, bribery and corruption became common. Many municipalities were becoming centers of wealth and population. The granting of franchises to use their streets for utility enterprises, the opening and closing of streets and other matters of economic importance afforded tempting opportunities for corrupt promoters and politicians. The municipality need not be consulted; a special law granting a street franchise would achieve the result. Another type of abuse was the "ripper bill". Legislative supremacy permitted the legislature to rip out of office "the crowd in city hall", whether they were of opposite politics from the party in power in the state government or for whatever reason.

Efforts to end the evils of legislative tinkering began about mid-century. Resort was had principally to constitutional prohibitions upon special legislation. This device enjoyed only limited success. In some constitutions the prohibitions did not go far enough. In a number of states the purpose was circumvented by classification of municipalities, usually by population. Municipal home rule, a much more drastic means of coping with legislative tinkering and assuring local autonomy was born in Missouri in 1875. Of bans upon special legislation and of home rule more will be said later.

After the Civil War many factors contributed to the development of the political machine and "bossism" in the large cities. They included an enlarged electorate consisting in substantial part of unassimilated European immigrants, the long ballot, diffusion of responsibility, unsatisfactory nomination and election machinery and the spoils system. Machine politics, more than anything else, placed American city government in merited disrepute. Late in the century reform elements came to life. In the early 1900's their efforts were greatly aided by the spotlight of the muckrakers. A turning point had been reached. Progress since that time has been uneven, but withal, very substantial.

See generally Fairlie and Kneier, op. cit. supra, c. 3; Reed, op. cit. supra, c. 5–9; Patton, The Battle for Municipal Reform passim (1941).

It would not do to end these historical jottings without some allusion to the financial record of local government in the nineteenth century. The general property tax soon became the chief producer of local government revenue. In the colonial period statutory authorization of tax levies was usually confined to specific objects. In the new century, however, ad valorem taxes came to be levied for the general support of government as well as for special purposes. They constituted the vital security of municipal bonds. In a real sense a general obligation bond issue was a mechanism for anticipating future ad valorem tax receipts. Budgetary procedures, business-like accounting and effective auditing methods are of quite recent development in local government. Not until the New York Charter of 1873 was there a suggestion of modern budgetary procedure.

Only the barest outline of the interesting career of local government borrowing can be given here. A valuable account of that financial record will be found in A. M. Hillhouse, Municipal Bonds c. 2 et seq. (1936). I have depended heavily upon Mr. Hillhouse in the statements which follow. State financing of internal improvements received a rude check in the panic of 1837. The panic provoked legal restrictions on state debt which curbed borrowing. The railroad era had arrived to open new vistas, especially to promotors and entrepreneurs. They turned to the local units of government. Thus was born the notorious railroad aid bond, which was sometimes issued in exchange for railroad securities and again only for such indirect benefit as the railroad construction would bring to the community. The desire for better streets, sewers and other public improvements, overstimulated by real estate speculators, brought on the market an increasing volume of general improvement bonds. Much of this was "speculator-aid" financing as was the well-remembered Florida aberration of the 1920's but, as Hillhouse has observed, it has never, until the recent Florida experience. received the notice accorded railroad aid financing.

From 1840 to 1860 outstanding municipals jumped from a figure of about \$25,000,000 to \$200,000,000. The panic of 1857 had brought on some defaults by local governmental units but this had scant effect on the trend. After the Civil War there was a surge of westward expansion and railroad aid financing went on in greatly increased volume. The depression of 1873 checked the flood of new issues but, even so, there was a large net increase for the decade. The panic of 1893 precipitated another shower of defaults but the prosperous years which followed were marked by tremendous borrowing and spending for local improvements.

It remained for this century, however, to bring out an unparalleled demand for old and new type public improvements with a corresponding increase in local debt. The total jumped from \$1,600,000,000 in 1902 to \$18,500,000,000 in 1933.

It is not intended to suggest that financial troubles occurred only in depression years. Unwise financing has brought trouble in the most prosperous periods. Special improvement district securities, particularly drainage and irrigation district issues, have had a very spotty record due in large part to the narrow economic base upon which they rested. Such an issue would stand or fall on the soundness of conception and efficiency of execution and administration of a single project. Too often neither factor was present.

Years before the disastrous panic of 1873, various legal restraints upon local borrowing were being resorted to. Constitutional or statutory tax and debt limitations, the latter usually expressed in terms of a percentage of taxable values, were adopted. Electoral approval was required. Prohibitions upon the lending of local credit appeared. Broadly speaking, such measures have met with but modest success. We shall see that there are ways of getting around debt limitations. The requirement of an election is not a big hurdle in good years. It is understandable that in the spirit of the times part of the grief of ill-advised local borrowing has been inevitable and has paralleled the tribulations of private finance but a heavier share may doubtless be attributed to our slowness in grasping the necessity of sound planning in public expediture, planning both of the projected improvement and of the financing to be employed. The successive waves of defaults in the last century produced a great deal of municipal bond litigation, largely in the federal courts which for obvious reasons early became the refuge of the bondholders, and out of this developed an important body of remedial law. Fortunately, in recent years, we have become increasingly aware of the virtues of preventive measures.

SECTION 2. GENERAL FUNCTION UNITS

It has been customary in the past to classify public corporations functioning at the local level as either municipal corporations or public quasi-corporations. Incorporated cities, towns, villages and boroughs constituted the first class; everything else fell within the second. At the root of this distinction were four factors: (1) the notion that counties and other "quasi-corporations" were almost exclusively state agencies administering matters of state concern as distinguished from the large sphere of local business with which municipalities dealt, (2) the assumption that the agencies to be labelled "quasi-corporations" were less complete forms of corporate organisms; (3) the notion that municipalities, unlike a county, for example, possessed, at least in

a limited sense, a private as well as a public character; and (4) the theory that while municipalities were established only at the request or with the consent of the inhabitants counties and other quasi-corporations were created by the state without the consent of the inhabitants. I Dillon, Mun.Corps. §§ 35–39 (5th ed. 1911).

Whatever factual basis the old classification may have had in 1911 stands seriously undermined today. The business of government at all levels has expanded enormously. The activities of conventional units, such as counties, have increased to the point that in some states the powers and functions of counties are almost as extensive as those of cities. Professor C. F. Snider's annual review of developments in county and township government, inaugurated in 1937 and published in the American Political Science Review, provides what may fairly be called a graphic running account of functional expansion in county government. Counties are not universally any more the creatures of the state government than municipalities. In several states, for example, constitutional provision is now made for county home rule. In legal theory, moreover, apart from positive constitutional provision to the contrary, the prevailing doctrine of legislative supremacy applies to municipalities as well as counties, although municipal incorporation is usually on a voluntary basis in fact. It is not uncommonly the case that the creation of a new county is, by force of express constitutional provision, subject to local referendum. This point was taken into account by the Ohio Supreme Court when it determined that a county was a "body politic and corporate" within the meaning of a garnishment statute. Uricich v. Kolesar, 132 Ohio St. 115, 5 N.E.2d 335 (1936). Old and new forms of ad hoc agencies of local government, which may also be called special function units, have come to be employed on a huge scale.

At the same time that county governmental activities are becoming more like those of cities, the functions performed by cities are falling more plainly into perspective as part of the total governmental business of the state at the expense of the old notion that much municipal activity is private or semi-private. The first fact which we observe is that government is doing the job for the community, whether the function be a venerable municipal activity, such as provision of streets, or a relatively new responsibility, such as recreational facilities. The second thing to note is that, while, in a sense, the inhabitants have a special interest in most of the activities of city government, in practically all instances benefits are freely available to all comers in a very fluid society.

The labels "municipal corporation" and "municipality" do not, moreover, have anything approaching definite content of general

acceptation. Where positive law does not dictate otherwise, it is convenient to use these terms to refer to cities and other general function urban units of local government organized in the corporate form. For purposes of a particular legal problem, however, one simply may not rest upon such a conception. Quite commonly constitutions or statutes use "municipal corporation" to embrace counties or specialized units like school districts as well as cities and the smaller urban fry.

There are instances, involving large cities with metropolitan problems, of city-county separation or consolidation. San Francisco and Denver are examples. New York City embraces five counties. New Orleans covers Orleans Parish and there is no separate parish government. The pressing problems of the suburbs, the urban fringe, have stimulated much talk of city-county consolidation in the cases of medium-sized cities. As a matter of fact constitutional authority for such consolidation has existed in several states, for a good many years, but little use has been made of it.

While any choice of agency to perform a function of government is likely to be conditioned by attachments to existing interests and by a veritable congeries of beliefs about political (and, mayhap, social and economic) values, the increase in the volume and kinds of business done by government has made it inevitable that people lay greater stress upon the simple idea that machinery should be adapted to function. This idea will bear heavily upon a choice between a general function unit, an established form of special function unit or a new type of special function unit to do the job.

The usefulness of "municipal corporation" versus "quasi-corporation" is, then, not apparent. The classification here adopted does, on the other hand, claim two virtues: (1) It gives expression to the differences between the regular machinery of government at the local level and ad hoc agencies tooled for special purposes; and (2) it lays appropriate emphasis upon function.

A. COUNTIES AND TOWNSHIPS

(1) Objectives

Every State in the Union is divided into counties (parishes in Louisiana). Organized counties number 3050 in all. Rhode Island stands alone in having no organized county government. In his, "The Units of Government in the United States" (Pub. Admin.Serv. No. 83, 1945), William Anderson points out (at pp. 19–20) that there are actually 3097 areas in which county func-

tions are performed. This total embraces 3050 organized counties, 5 unorganized counties in Rhode Island, 5 unorganized counties in South Dakota, 5 counties in New York City, 7 counties consolidated with large cities, the District of Columbia and 24 independent Virginia cities. The importance of the county in the governmental structure varies greatly. In New England the town is the primary governmental unit at the local level and the counties are not of great significance either in structure or func-The counties in some of the southern and western states are divided into townships (in Louisiana the parishes are divided into wards), which are little more than geographical divisions for limited administrative purposes. In those states the county is clearly the basic unit of local government. In a central group of states, extending from New York into the Middle West, the township (town, in New York) exists as an organized agency of local government. In some of these states the whole area is subdivided into townships; in others townships exist in only part of the counties, as in Illinois. Whether the township pattern covers incorporated areas is a matter which varies from state to state. With very limited exceptions, as in Virginia, the county, on the other hand, embraces municipalities and unincorporated areas alike.

The New England town is a distinctive institution, celebrated for its approach to pure democracy achieved through the town meeting. The whole area of Connecticut, New Hampshire, Rhode Island, Massachusetts and Vermont and most of Maine is organized into towns and cities. The towns embrace rural areas as well as some urban communities. In powers and functions they are not unlike cities except that, as is the case with counties in other stat..., they are employed more extensively by the state as units of administration in elections, taxation, land records, probate and other matters. The close similarity to incorporated cities is recognized by the Massachusetts statutes, which broadly confer upon cities the powers of towns. Mass.Gen.Laws, c. 40, § 1 (1932).

In some states townships are irregular in shape and area, but in the middle west most of them conform to the geographical township of 36 square miles, which were laid out by United States Government surveys of the public domain before settlement.

In the past the principal objectives of township government have been highway construction and maintenance, education and poor relief. In addition they served as local units for tax administration, elections, petty justice and law enforcement. That was the pattern of a simpler day when township jurisdiction was largely rural. The tremendous urban overflow into suburban areas beyond corporate limits has changed all that. This urban periphery demands urban facilities and services from govern-

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ment. There has accordingly been enacted much enabling legislation designed to equip townships to meet the need. The Michigan development has been described by John A. Perkins in "Government of 'Rurban' Areas" 37 American Political Science Review 306 (1943).

A word has already been said about the expanding scope of county activities. We come now to a more deliberate examination of county objectives. If we consider the country as a whole it seems fair to say that the county most nearly deserves the label "basic local unit of government." Traditionally, it has been used by the state as an administrative unit in tax assessment, levy and collection, in the work of the judicial system, in law enforcement, in highway and bridge construction and maintenance, in education, in correctional functions, in public assistance to the needy, in public health services and in elections. This generalization does not, of course, take into account the countless local variations which exist. It does not, moreover, suggest any uniformity in extent or character of state supervision of county participation in the listed functions. Nor does state use of the county unit always involve employment of the county governmental machinery. Not uncommonly the officers or bodies performing at the county level are quite outside the county government.

During the economic depression, which followed in the wake of the heedless twenties, it began to look as if the county was destined for a position of severely reduced importance in the scheme of things. The general property tax, the financial mainstay of local government, was at a low ebb of productivity. Some states adopted constitutional tax limitations, which added legal to economic incapacity. It was then that the states, of necessity, turned to indirect sources of revenue, such as the retail sales tax. Some of the funds thus raised were allotted to local government for expenditure but, quite significantly, the state in many instances took over the actual administration of the particular activity as well as the financial burden. Thus, in some states, such as North Carolina and West Virginia, secondary roads were shifted from county to state highway department administration.

Far, however, from the depression casting the county permanently in a minor rôle, the unit stands today "a more vital part of our governmental picture than ever before." Edward W. Weidner, "Confused County Picture—III" 35 Nat. Mun.Rev. 288 (1946). The functions lost to the state in the early thirties have been far more than offset by new activities paralleling those of municipalities and numerous functions, such as rural housing promoted by the Federal Government.

(2) Governmental Structure

The town meeting form of government is an institution born in the early days of the settlement of Massachusetts and nourished to meet the practical needs of the settlers. Concerning the theories of New England town origins see John F. Sly. Town Government in Massachusetts 52 et seq. (1930). The heart of the institution has been election of officers by the qualified inhabitants assembled at annual town meeting and direct policy determination at the annual meeting and such special meetings as might be duly called. Administration is the business of a small number of selectmen and quite a list of lesser officers. The towns have been slow to respond to the pressing need for competent and economical administration. So strong has been the attachment to the town meeting that, in the case of the populous towns, where sheer numbers make the town meeting procedure impossible, the tendency has been to resort to a modified or limited town meeting made up of a liberal number of delegates from precincts within a town rather than shift to representative government in the city form. Sly, op. cit. supra, at 164 et seq.

In a northern tier of central states township meeting government obtains. It has been suggested that this may be explained by reference to population movements westward along parallel lines from New England, the cradle of the town meeting. Fairlie and Kneier, op. cit. supra, at 458. The powers of township meetings vary, as one would expect, but we can generalize to the extent of observing that such powers are usually narrower than those of a New England town meeting. For the most part, too, popular interest and participation are much less than in New England.

Two types of township governmental organization predominate. In several states there is a governing committee or board of supervisors or trustees and lesser administrative personnel but no single chief officer. In others there is a head officer as well as a township board. In Michigan, for example, the officers consist of a township supervisor, a clerk, a commissioner of highways, a treasurer, constables and justices of the peace. The supervisor, clerk and the two justices of the peace, whose terms expire soonest, constitute the township board. The justices are elected for four-year terms; the others are elected annually.

Township government has been widely criticized as notoriously inefficient. In Report No. 3 of the Committee on County Government of the National Municipal League, published in 23 National Municipal Review 139 et seq. (1934), it was concluded

that the township was no longer a satisfactory local unit of government and steps for its elimination were recommended. The report marshaled these objections to the unit: (a) It is generally too small for adequate financial support and efficient administration; (b) it serves the public on a high per capita cost basis; (c) such major functions as administration of justice, health and welfare, highways and finance require organization and competence which render the township unit obsolete; (d) the use of the unit as a district for selecting representatives on the county governing body is seriously objectionable because conducive to petty politics, unwieldy bodies and provincial attitudes and (e) it is an artificial area having no necessary relation to trade or industrial areas. This is a strong indictment but traditional local institutions like the township die hard.

Lord Bryce was amazed by the backwardness and corruption he observed in city government in the United States. 1 Bryce, American Commonwealth 608 (1888). Local government generally deserved his indictment. The muckrakers graphically documented it as to large cities in the early years of this century. Autobiography of Lincoln Steffens part III (1931). Since then municipal government has emerged from the jungle; progress has been widespread. Not so with the counties. There are signs of awakening here and there, but, by and large, the picture is one of a government with badly outmoded organization and methods faced with the complex problems of policy formulation and administration with which our times confront the county. It is understandable that the municipalities have made more progress. They have long been subjected to the pressures of a complex urban society. Extra-municipal urbanization, metropolitan developments and the strong demand for city services in rural areas have now brought the subject of structural and administrative reform in county government acutely to a head.

There is, of course, great diversity in county governmental organization, but one significant general observation may be made. Whether the county governing body be a board of chosen free-holders, board of county commissioners, board of supervisors, police jury, county court, fiscal court, or what not, its organization was doubtless much influenced by the conception of the county as an administrative and judicial division of the state. Edward W. Weidner, "The Confused County Picture" 35 Nat.Mun.Rev. 166 (1946). In June 1947 the Bureau of the Census issued a valuable study of "County Boards and Commissions," which contains detailed data on the types and organization of county governing bodies.

The use of judicial-type governing bodies in some states and the very designation "county court" are reminiscent of early English local government. Tennessee has a well-preserved survival of that venerable English institution, the court of quarter sessions. The county courts of quarter sessions are made up of the justices of the peace of the counties. They smack more of the Middle Ages than 1950. Today's requirements call for an effective county policy-making body, on the one hand, and a centralized, expert, responsible administrative establishment, on the The manager plan is probably the governmental form best suited to the job. See George W. Spicer, Ten Years of County Manager Government in Virginia (University of Virginia Extension, 1945). Instead of reforming county government, however, the tendency has been to abuse the special function unit device by creating a plethora of ad hoc bodies or units within the general county framework and thereby effecting an uncorrelated diffusion of administration and responsibility. In contrast with the more than 700 manager-plan municipalities, there are only some twenty or more counties which have adopted the county manager plan. Local politics, the spoils system and public apathy are factors. A helpful selected bibliography on county government appeared in 28 Nat.Mun.Rev. 180 (1939).

B. CITIES, TOWNS, VILLAGES AND BOROUGHS

(1) Objectives

Mention has already been made of the old dual personality formula concerning the character of municipalities. It still has considerable vitality in tort cases against municipalities and other limited fields, as will appear in the treatment of particular topics, but it is definitely giving ground under the pressure of the realities of public administration.

Municipal activities and services are so numerous and varied that it would make quite a catalogue merely to list them. They begin at the cradle and end at the grave. A citizen who was born in a city hospital may eventually rest in a city cemetery. The organized municipal community will be concerned with his safety, health and morals throughout all his years. Nay more, it will more or less actively bestir itself to provide him cultural advantages, recreational facilities and a protected home situation conducive to the well-being and happiness of his family. In some cities he could progress from kindergarten through professional school in municipal educational halls. In addition to a basic pattern of public ways, his city may provide one or more types of public transportation. It is almost certain to be engaged in ren-

dering one or more of the other utility services essential to urban life. His city may take a very positive hand in his economic life by such diverse and not always consistent means as advertising the advantages of the community, inducements to business concerns to settle there, whether in the form of public improvements like market and terminal facilities or something in the way of positive economic concessions, provision of low-cost housing, municipal operation of enterprises like ice plants and gasoline filling stations and regulation of business activity under the police power.

While there are those who persist in labeling many of these activities as the private business of city government, no label could obscure the fact that when government constitutionally enters a field the activity becomes public business. Entirely apart from individual notions of the proper sphere of government, one can say, quite empirically, not only that the concept of municipal public purpose has expanded to embrace an immense area of direct municipal activity but also that the hand of the city has moved beyond regulation to a substantial measure of positive direction and control of private property and economic activity.

(2) Governmental Structure

The Municipal Year Book 1948 (at p. 41) sets out the following data on the forms of government which obtain in the 2,033 cities, including 79 New England towns, of over 5,000 population:

	No.	Percentage.
Mayor-Council	1215	59.8
Commission	308	15.1
Council-Manager	433	21.3
Limited Town Meeting	26	1.3
Town Meeting	51	2.5
		48. 24. 2 4.4.
	2033	100.0

These figures, of course, do not pretend to reflect the great diversity which exists as to particular features of any one of the popular forms of city government. Those variations must be taken as an implicit qualification of any general description of the forms of municipal government.

The mayor-council form is further classified into two subtypes, weak mayor-council and strong mayor-council, which are distinguished largely by reference to the position of the mayor. The weak-mayor form usually has a large council elected by wards, an elected mayor without veto power and with limited administrative authority and elective or counsel-controlled department heads and boards. The strong mayor plan, by contrast, is built along simple lines of clear-cut responsibility. Policy determination rests with a council elected at large or by wards. The mayor is the real administrative head of the city. He has power to appoint and remove most department heads. He prepares the budget for council consideration. And, finally, he usually has the veto power. The principal defect in the plan is that, although it centralizes administrative responsibility, it gives little assurance that the man at the helm will have the needed competence.

Under the commission plan a city is governed by elected commissioners who, individually, serve as department heads and, as a group, constitute the legislative body. One of the commissioners serves as mayor but the position is little more than that of presiding officer and "front man." Commonly, the office of mayor attaches to a particular commissionership. The plan is unsatisfactory with respect both to policy-determination and administrative functions. It ignores the differences in qualifications desired for officers performing the two functions; it gives the council members a departmental approach, which impairs their scope and independence in policy-making; and it divides administrative responsibility into rather fixed areas.

The council-manager form has a small council, usually elected at large and vested with the policy-making power of the city. Responsibility for administration rests with the manager. Many city managers are professionally trained for the work. In the absence of some special legal limitation, a municipality does not have to select from local talent but may look the country over. The manager is appointed by the council, accountable to the council and removable at any time by it. The manager has the power of appointment and removal subject to governing civil service provisions. He prepares and submits the budget to the council. The plan does not eliminate the mayor but confines him largely to presiding over council meetings and serving as the political and ceremonial head of the city.

Among students of municipal government the city manager plan is strongly favored as the best form of city government we have developed. It preserves American ideas of political responsibility in elected representatives and, at the same time, is designed to bring expertise, co-ordination and centralized responsibility into municipal administration.

SECTION 3. SPECIAL FUNCTION UNITS

While there has, of late, been a genuine effort in some states to reduce the number of special function units of local government, there is ample basis for the observation that the ad hoc unit is still enjoying its heydey. In 1942 the Bureau of the Census issued a report, entitled "Governmental Units in the United States," which tells us that there were then 155,116 governmental units in the country. Some of the data presented in that report are set out also in the Municipal Year Book 1947 at pages 15-24. Roughly three-fourths of the total announced by the Census Bureau were ad hoc units. In amassing its data the Bureau counted as governmental units only those local agencies which constituted "geographical subdivisions or population concentrations" and were "politically organized for the conduct of local affairs." This leaves out of account thousands of improvement and service districts of counties and municipalities which have no formal governmental structure apart from that of the parent county or municipality. There was no attempt, moreover, to cover ad hoc agencies at the Federal and state levels.

In an independent enumeration William Anderson had arrived at a total of 175,418 units as of 1930–33. A second edition of his pamphlet "The Units of Government in the United States" (Public Administration Service No. 83, 1945) gives us a total of 165,049. The decrease was attributable largely to a reduction in the number of school districts from 127,108 to 118,308. Another factor was the greater care with which the second enumeration was made. The difference between the Anderson figures and those of the Bureau of the Census is accounted for almost entirely by the Bureau's strict application to school districts of its definition of a local unit of government. The Bureau school district total of 108,579 was 9,729 less than the Anderson figure of 118,308. Mr. Anderson candidly states (at 48) that he considers the Bureau enumeration more accurate than his own.

In recent years the influence of the Federal Government upon the establishment of local special function agencies has been very great. It has had a hand in the creation of new types of ad hoc units to perform new functions. This has offset, in part at least, decreases in the ranks of such traditional units as school districts. Federal leverage has, of course, been financial assistance. The Government's objectives have been, at one time, stimulation of economic activity and economic recovery through public works and, at another, the effectuation of national policy as to particular objectives of government. In the latter category the Government has gone beyond the old federal grants-in-aid concept of assuring a minimal level, on a national scale, of public service. Conspicuous examples of federally fostered ad hoc agencies are the numerous local housing authorities and soil conservation districts widely dispersed over nearly all the states.

While we have observed that there is a growing emphasis on functional appropriateness in the choice of an agency to perform a public function it is nonetheless true that a variety of extrinsic factors have had a hand in the mushrooming of ad hoc units. The device has been used to avoid constitutional debt and tax limitations. It is widely employed to give effect to the idea that those specially benefited by a public improvement or service shall both bear the financial burden and enjoy political control. General statutes make it possible for those private individuals who are expected to be benefited by the creation of such an ad hoc unit to make the decision as to its establishment subject, of course, to meeting the minimum requirements of the law as to substance and procedure. The mechanism has been much exploited as a means of providing this or that commonplace urban service in a suburban area, an important factor in the development of which had been escape from city taxes. Usually in these cases the choice of the ad hoc agency to meet a particular situation is quite pragmatic, considered in that limited context. The trouble is that the over-all, long-range perspective, which relates special interests and special functions to the general interest and the broad objectives of government, is slighted. Thus, a special suburban sewer district may give temporary protection but the chances are that difficulty will be encountered later in gearing the district's facilities to a master sewer plan for the metropolitan community.

The indiscriminate creation of a complex of ad hoc agencies is not calculated to simplify the already difficult problem of community planning and zoning. Today the suburbs are the physical crux of that and other vital concerns of local government. The situation brings us up against the practical question—how may we effect the absorption by general function local units of the bulk of the business of the ad hoc agencies and confine the employment of the latter to situations requiring extraordinary treatment?

Our sewer district illustration can be made to cut both ways. A piece-meal attack is not compulsory. If the optimum area for a metropolitan sewage collection and disposal service includes a principal city and a large suburban fringe, which may embrace both incorporated and unincorporated areas, a metropolitan sewer district might be patterned to the need. It has even been suggested that by use of such metropolitan districts, at first for limited functions and later for additional governmental serv-

ices, a practicable solution to the complex problems of metropolitan areas may be effected. This projects a metropolitan ad hoc unit as an agency likely to evolve into a general function unit on a metropolitan scale. Ralph F. Fuchs, "Regional Agencies for Metropolitan Areas" 22 Wash.Univ.L.Quar. 64 (1936).

The welter of special function units at the local level defies satisfactory classification. There are numerous possible bases for groupings, such as unit functions, methods of financing unit activities, relation to general function units, unit governmental structure and method of unit establishment. Any pattern adopted would be rather arbitrary. That is readily conceded to be true of the modified functional classification which follows.

A. SCHOOL DISTRICTS

Of the 116,878 special function units counted by the Census Bureau in 1942, 108,579 were school districts, some ninety per centum of which, in turn, were small rural districts. At least one state, North Carolina, has taken over school administration. In a few states the county unit plan and in others consolidation of inadequate districts has been fostered, but these things constitute hardly a dent in the almost incredible decentralization of school administration the country over. While public education is considered a state responsibility, local interest and support have been such cherished values that extreme localism in organization and administration prevails. Local initiative will determine, under general law, the question whether there shall be established a high school district to provide high school facilities and training in a particular area, which might well overlap another district or districts established for non-high school purposes. A district so created commonly will have corporate capacity but that is not universally so. The governing body will be the almost ubiquitous school board or board of education. To that body the administrative head, the superintendent or principal, must account. Teachers' tenure laws will afford him some protection against prejudices or political considerations which might sway the board. The financial burden of public education is so great that the state shares it with the local units by providing funds for capital outlay, or maintenance and operation, or both.

In the cities there has been an insistence upon school personnel and facilities of high quality usually superior to those provided or providable over the state as a whole. That is an important reason why municipal control and administration of public schools still widely obtains. There may, of course, be a

separate school authority in a municipality; a school district might overlap it or be co-terminous with it. The economic strength of the community will support the desire for higher standards in that case also. This desideratum may be advanced even where a municipality is in no sense a unit of school administration by provision for the voting of a special municipal school tax to provide additional funds for the support of public schools in the municipality.

The length to which uncoordinated public school decentralization has been carried in some states is suggested by the following case.

PEOPLE ex rel. FRAILEY v. McNEELY

Supreme Court of Illinois, 1941. 376 Ill. 64, 32 N.E.2d 608.

FARTHING, JUSTICE. The People, on the relation of Birt Frailey, Emory Hopper, and D. R. Bartimus, filed a petition in the circuit court of Fayette county and asked leave to file an information in the nature of quo warranto against the persons named as defendants who assume to act as members of the board of education of pretended Community High School District No. 194. Leave was granted and the information was filed. It questioned the legality of the district and prayed that the defendants be required to show by what authority they claimed to hold their offices. In their answer the defendants set out the proceedings by which the district had been organized and by which they had been elected, and alleged that all this had been done according to the statute. Ill.Rev.Stat.1939, chap. 122, par. 97. Upon trial of the case, the court found that the district had been legally organized, and that the defendants had been duly elected members of the board of education of said district. The complaint was dismissed, and the plaintiffs have appealed directly to this court.

In their statement and brief, appellants contend that the act under which this district was organized is unconstitutional. This point is not before us, however, because it is not argued, and because the appellants have failed to point out the section of the constitution which is supposedly violated by the act. However, the legal existence of district No. 194 is questioned, and a franchise is involved. People v. Myers, 276 Ill. 260, 114 N.E. 584; People v. Marquiss, 192 Ill. 377, 61 N.E. 352; People v. Cooper, 139 Ill. 461, 29 N.E. 872. This court, therefore, has jurisdiction of this appeal.

Community High School District No. 194 is composed of approximately 82 sections and comprises parts of three counties.

The western part of the district consists of 38 whole sections and parts of 2 other sections lying in the northeast part of Fayette county. The eastern part of the district is composed of parts of two counties. On the extreme north are 6 sections of Shelby county. To the south of these sections are 36 whole sections and parts of 3 sections lying in the northwest part of Effingham county. That part of the district which is in Fayette county extends approximately three miles farther south than that portion which is in Effingham county. Also, that part in Effingham and Shelby counties extends two miles to the north of the Fayette county land. However, there is a five-mile common boundary between the sections lying in Fayette county and those in Effingham county. The district is of irregular shape. Its longest measurement is from east to west, 12 miles, and the greatest north and south length of that part of the district to the east, lying in Shelby and Effingham counties, as well as that part of the district to the west, lying in Fayette county, is approximately eight miles. There are four villages in this territory, Beecher City, Mocassin, Holland, and Carter Camp. Beecher City, which is the largest, has a population of 500 and is near the geographical center of the district. It was chosen as the location of the community high school. State highway No. 128 runs north and south along the boundary between Fayette and Effingham counties, and it is connected with Beecher City by paved roads. None of the remaining roads of the district are paved, but many are graveled or oiled and are all-weather roads.

Appellants first contend that district No. 194 is invalid because not composed of contiguous and compact territory as required by section 89a of the School Law. Ill.Rev.Stat.1939, chap. 122, par. 97. That paragraph provides that fifty voters residing in any contiguous and compact territory may petition the county superintendent of schools to order an election to be held for the purpose of voting for or against the proposition to establish a community high school.

A compact school district has been defined to be one so closely united and so nearly adjacent to the school building that all the students residing in the district may conveniently travel from their homes to the school building and return the same day in a reasonable length of time with a reasonable degree of comfort. People v. Vance, 374 Ill. 415, 29 N.E.2d 673; People v. France, 314 Ill. 51, 145 N.E. 240. Every reasonable presumption will be indulged in favor of the validity of a school district established by authority of the legislative department of the government, and the courts will not hold the district invalid for lack of compactness or contiguity unless it clearly appears from the evidence that children of school age residing in the district

cannot reasonably avail themselves of the privilege of the school. People v. Vass, 325 Ill. 64, 69, 155 N.E. 854; People v. Standley, 313 Ill. 46, 48, 144 N.E. 355. To show that children of this district could not reasonably avail themselves of the school at Beecher City, the appellants introduced testimony that roads at particular places throughout the district in the past had occasionally been impassable. At such times they claimed that all of the students would not be able to reach the high school. However, some of these witnesses admitted on cross-examination that the impassable roads to which they referred were not on the bus route which had been established by the school district, and others admitted that children in their vicinity had, during the last several years, attended the three-year high school which was formerly maintained at Beecher City. A former bus driver for the high school, who had testified to the bad road conditions, admitted, on cross-examination, that he could not recall missing a day with his school bus from 1936 to 1938. To show that the children of the district are able to avail themselves of the high school at Beecher City, the superintendent of schools for Community High School District No. 194 testified that the high school, at the time of the trial, had an enrollment of 152 students, and that it met the requirements of a four-year accredited high school in Illinois. He said that the district had two buses operating over established bus routes, and that another bus had been ordered and that these buses served all of the students of the high school. The driver of one of these buses testified that eighty per cent of the students live on the bus routes, and that they are either paved or gravel all-weather roads. He also testified that a mile and a quarter is the most that any of the remaining children have to walk in order to reach the bus. This was corroborated by the other bus driver. except that he estimated the maximum distance that any of the students had to walk at a mile and a half. Paragraph 705 of the School Law, Ill.Rev.Stat.1939, chap. 122, par. 705, provides that the State shall reimburse a school district for threequarters of the cost of transporting non-high school students to school, providing they live more than a mile and a half from the school house. It is a fair inference from this that the legislature considered it reasonable to require children to walk a mile and a half to school, if necessary, and it is reasonable to require them to walk that distance to a bus line. Other witnesses for the appellees testified that the district roads were in a good condition, and that the bad spots in the road described by the appellants' witnesses had recently been repaired. The appellees also introduced in evidence exhibit L which shows that in the past many students from almost all of the sections in this district have attended the high school at Beecher City.

Considering all of the evidence it appears that children of school age can reasonably avail themselves of the privileges of the school, and, therefore, the district must be held to be composed of compact and contiguous territory. The circuit court so held, and we will not set aside that judgment since it is not against the manifest weight of the evidence. People v. Vance, supra. . . .

The appellants next contend that all of the territory within this district is not a part of the community of Beecher City, as required by law, and that the district is, therefore, illegal. In support of this contention several witnesses testified that they did their shopping, went to church, and participated in social activities, in other villages besides Beecher City. However, the fact that people residing in the community high school district trade at stores, deliver grain to elevators, do their banking business and attend church in cities or villages outside the district does not, of itself, establish that the territory in which they live is not a part of the community of Beecher City for high school purposes. People v. Standlev, supra. The issue is whether the proposed district is a community in so far as education is concerned. Many of the appellants' witnesses testified that their children, or children in their vicinity, were attending or had attended the high school at Beecher City. And exhibit L. above referred to shows that children from almost all of the sections of the district had attended the three-year high school at Beecher City during the last several years. This evidence shows that the district is a community in so far as education is concerned.

The judgment of the circuit court of Fayette county is affirmed.

Judgment affirmed.

The statute involved in the principal case was so amended in 1941 as to require a minimum population of 1,500 and assessed valuation of \$1,000,000 in a territory to be constituted a community high school district. The amendment also increased the minimum number of petitioners from 50 to 100. These changes were carried over into The School Code of 1945. Ill.Ann.Stat., c. 122, § 10-9 (Smith-Hurd, 1946). Legislative recognition of the bearing of population and economic strength upon the question whether a local school district shall be created is significant.

B. IMPROVEMENT, SERVICE AND CONSERVATION DISTRICTS

The older types of improvement districts are familiar enough to the layman. He is acquainted with road, sewer and sanitary, irrigation, drainage and, perhaps, even waterworks, power, gas, port, harbor and terminal districts. He knows that such districts are, for the most part, merely devices for providing public facilities and services in special areas at local expense. The pattern is an old one. The device has been so extensively exploited of late, however, that even the student of local government has trouble keeping informed of the types of special districts which swarm over the land. Suburban folk are particularly interested in fire protection, garbage collection, park and recreation, sewerage, and waterworks and other utility districts. People in the rural areas are making use of soil conservation districts, noxious weed control districts, insect pest control districts, flood control districts, rural free library districts, forest fire control districts, wind erosion districts, water conservation districts, and local units established to finance industrial plants for processing farm products. These examples far from exhaust the list. Mention might also be made of levee districts (an old type), malaria control districts, navigation and river improvement districts, welfare institution districts and health districts.

Methods employed in creating special districts range from direct establishment of particular districts by constitution or statute, through authorization by positive law to a general function local unit to create ad hoc units on their own initiative, to procedures for private initiation of organization proceedings and, if legal requirements are met, formal action by one or another public authority, be it a court, local governing body, or what not, establishing particular units. Variations as to detail are well-neigh infinite.

Some special districts have no separate governmental structure. It is not uncommon for the governing body of a creator general function unit to serve as the governing authority of a creature special function unit, even though the latter may be constituted a separate public corporation to facilitate the entering into of legal relations independently of the parent unit. Again, there is the type of ad hoc unit, which has a separate set of officers who are, however, the appointees of the chief executive officer or governing body of a parent general function unit. Finally, there are special function units which have governing bodies of their own choosing.

The financing of most of the older types of improvement districts has been based upon ad valorem taxation, although in drainage districts, for example, acreage taxes have not been un-

common. An annual ad valorem levy has been the prevalent method in districts organized as separate governmental units, as distinguished from mere geographical areas set off for given improvement purposes, even where, in legal theory, benefits were the basis of assessment. If a special function unit is set up to construct and operate a revenue-producing facility it may suffice to enable it to resort to revenue-bond financing without any recourse to the taxing power. Under that pattern both expenses of operation and maintenance and debt service requirements on revenue bonds issued to finance the facility must be met out of facility revenues. (There may, of course, be provision for a mortgage of the physical properties as additional security.) A combination of tax and plant-revenue financing is a further practical plan. There are ad hoc units the activities of which do not entail substantial capital outlay or which, in any event, can get along without taxing power because they receive financial assistance from the Federal or state governments. standard soil conservation district act expressly denies taxing power. It contemplates financing through Federal and state grants in aid.

Sometimes regulatory functions are made the responsibility of special function units. Thus, under the standard soil conservation district act, a district may adopt land-use regulations which constitute an advanced form of agricultural zoning.

C. AUTHORITIES

Something rather new in the land is the so-called public authority. The original American instance of this type of agency is the Port of New York Authority, which dates from 1921. It is a bi-state creation of New York and New Jersey accomplished with Congressional consent and designed to effect port development in the New York harbor area. The Authority consists of twelve appointed commissioners, six from each state, who are constituted "a body corporate and politic." It is significant that, as is quite common in the organization of various types of special function public corporations, it is the governing body of the agency which is the corporation.

There is no magic in the designation "authority." New York and New Jersey borrowed it from the Port of London Authority. It has been said that Lloyd George suggested the term for the London unit in view of the many affirmative grants of authority which the enabling statute contained. Lecture by Julius Henry Cohen, General Counsel of The Port of New York Authority, entitled "The Port of New York Authority—The Evo-

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lution of the Authority Plan in American Administrative Law," delivered at the New York University School of Law, March 13, 1940. Actually, the term might have been used quite aptly a century or more earlier in the designation of local ad hoc units. See Sidney and Beatrice Webb, Statutory Authorities session (1922).

Mention has already been made of the impetus given the creation of local authorities by the Federal Government. That Government itself has established some on the national level, such as the United States Public Housing Authority, and some on the regional level, for example, the Tennessee Valley Authority. A conspicuous type on the local level is the local public housing authority. While it may not be universally so, it is certainly true in most cases that a local public authority is organized to construct and operate public facilities of a revenue-producing character which can be financed by the issuance of obligations payable solely from such revenues without recourse to taxation. It may or may not have definite geographical limits. It does not rest upon any body of inhabitants or constituents. Nor does it have legislative power.

D. FEDERAL LOCAL UNITS

The District of Columbia does not enjoy local self-government. Congress has constituted the District a municipal corporation and, by an Act of Feb. 21, 1871, 16 Stat. 419 (1871), it provided an executive and legislative assembly for the District. This establishment was shortlived; the applicable statutory provisions were repealed by an Act of June 20, 1874, 18 Stat. 116 (1874). District administration now is headed by three commissioners two of whom are resident civilians appointed by the President, by and with the advice and consent of the Senate, and the third is an officer in the Corps of Engineers of the Army detailed by the President for the duty. Congress legislates directly for the District but has, from time to time, granted authority to the commissioners to make police and other regulations on a variety of subjects.

A title on self-government for the District of Columbia was eliminated from the bill, which became law as the Legislative Reorganization Act of 1946, to make way for a separate bill, S. 1942, to incorporate a Federal City Charter Commission. The object of the corporation proposed in that bill would be the preparation of a council-manager charter for the District to be first submitted to Congress and then to popular referendum if authorized by Congress. The bill was favorably reported by the

Senate Judiciary Committee but never came to a vote. A special subcommittee made a study of the problem and presented a report to the Second Session of the 80th Congress recommending that a substantial measure of "home rule" be extended to the District. The proposal was articulated in H. R. 4902, which had it been enacted, would have constituted the charter of the District of Columbia. "Home rule" for the District of Columbia means self-government as distinguished from government by Congress and Congressional committees. Under H. R. 4902 home rule in the sense of charter-making power would not have been granted.

The Legislative Reorganization Act of 1946 continues the Senate and House Committees on the District of Columbia without change in their powers and duties. Those committees, as is well known, exert powerful influence in the shaping of policy as to District affairs.

There is a hybrid type of federal public corporation which has local aspects. On occasion, local interests have procured the enactment by Congress of a measure creating a bridge commission to construct and operate a bridge across interstate navigable waters. This device is a possible recourse where interstate cooperation in such a project has not been achieved. In one case Congress went so far as to confer authority upon the mayor of a Texas city to appoint the members of the federal commission. Act of June 18, 1934, 48 Stat. 1008, 1009 (1934). When it was pointed out that this involved a highly dubious abdication of the power to appoint federal officers, the act was so amended as to name the first commissioners and provide for appointment of successors by the Federal Works Administrator. Act of July 26, 1939, 53 Stat. 1121, 1122 (1939).

The General Bridge Act of 1946, which constitutes Title V of the Legislative Reorganization Act of 1946, is designed to eliminate the necessity of a special act of Congress to authorize each proposed interstate bridge over the navigable waters of the United States by granting general consent as to all bridges, the location, plans and specifications of which are approved by the Secretary of War and the Chief of Engineers. It would not, however, appear to outlaw the federal bridge commission device, since there is no occasion to employ it until it is found that state and local agencies cannot work the problem out.

The Wheeler-Howard Act of June 18, 1934, authorized the Secretary of the Interior, upon petition, to issue a charter of incorporation to an Indian tribe, subject to ratification by tribal referendum. 48 Stat. 988 (1934), 49 Stat. 378 (1935), 25 U.S.C. § 477 et seq. (1940). See Felix S. Cohen, "Indian Rights and the Federal Courts" 24 Minn.L.Rev. 145, 179 et seq. (1940).

Chapter 2

THE PLACE OF LOCAL GOVERNMENTAL UNITS IN THE GOVERNMENTAL STRUCTURE—INTER-GOVERNMENTAL RELATIONS

SECTION 1. JUDICIAL CONTROL

The strategic position of the courts in reviewing, under our system, the conduct of public affairs is nowhere more decisive than in the field of local government. Judicial review of legislative, executive, and administrative action is extensive and crucial at all levels of government, but we find it to be most detailed and most pervasive at the local level. This is, as we have seen, well-grounded historically in English practice. Our system of written constitutions, authoritatively interpreted by the courts, has made American judicial control even more important. to local government, however, the underlying idea remains the same—local units must stay within the law, both as to substantive powers and procedure. They may be restrained or compelled to act, as appropriate. A great armory of judicially administered remedies and sanctions is available. Within it are prerogative writs such as mandamus, prohibition, quo warranto and certiorari, ordinary civil liability for damages, equitable relief by injunction, declaratory judgments, and even criminal liability. The list of the classes of litigants with standing to raise legal questions affecting local government is, moreover, a long one. The point is, in sum, that the conduct of government at the local level is, to a unique degree, subject to judicial scrutiny. The ready availability of judicial review has facilitated resort to friendly test suits as forehanded means of settling questions which might affect the validity of action by a local unit.

The effect, at times, has been more deliberate judicial participation in the formulation of policy than is characteristically the case with the judicial process. This has happened with respect both to matters of local discretion and to state policy. A recent Louisiana case, State ex rel. Bass v. Mayor and Board of Aldermen of City of Oakdale, 207 La. 415, 21 So.2d 482 (1945), is illustrative as to local discretion. By statute it was made the duty of the governing body of a parish and that of a city, situated within the parish, to make provision for the salary of the marshal of a municipal court. Each governing body was authorized to fix its share "in such amount as shall be determined by it." The city set its share at ten dollars per month. The parish followed suit. The marshal sought mandamus to

compel the city to pay him at the rate of \$1250 per year. He attacked the city's action as a device to remove him from office by indirection. Mandamus was granted ordering the payment of \$100 per month. The case is discussed in 6 La.L.Rev. 541 (1946).

EAGLE v. CITY OF CORBIN

Court of Appeals of Kentucky, 1938. 275 Ky. 808, 122 S.W.2d 798.

Stanley, Commissioner. For the purpose of reconstructing, enlarging and improving its combined electric light and water plant, Corbin, a city of the third class, proposed to issue $3\frac{1}{2}\%$ bonds for \$220,000 payable out of the plant's revenues. A federal grant of approximately \$180,000 has been made to supplement that amount, thus providing \$400,000 for the extensive project. Taxpayers have challenged the authority of the City to issue the bonds upon several grounds, but the circuit court has held the action to be authorized and the proposed bonds to be valid. The question is before this court on appeal. . . .

The ordinance recites that the proposed bonds had been sold by an agreement entered into between the city and a named purchaser on July 11, 1938, and undertakes to ratify and confirm that contract and sale and to authorize the delivery of the bonds to that purchaser upon payment therefor in accordance with the terms of sale. It was entered into fifteen days before the ordinance was introduced and nearly a month before it was adopted. It is beyond the power of a municipality to contract to sell or dispose of bonds before they come into existence, or, at least, before they are authorized. Hansard v. Green, 54 Wash. 161, 103 P. 40, 24 L.R.A., N.S., 1273, 132 Am.St.Rep. 1107; 44 C.J. 1214. The explanation of this transaction is that the named purchaser was the only bidder of par for similar bonds when it was proposed to issue them two years before. The conditions had materially changed. Bids offered then upon a proposition subsequently abandoned and repealed were certainly not bids offered for this one. It is true that a city may ratify a contract defectively made when it had power to make it properly in the first instance. Masonic Widows' & Orphans' Home v. City of Corbin, 229 Ky. 375, 17 S.W.2d 215. But a contract entered into without authority of a statute or opposed to the principles of public policy may not be ratified. Fabric Fire Hose Co., v. City of Louisa, 253 Ky. 407, 69 S.W.2d 726. Sections 2741L-5 and 3480d-5 authorize the sale of bonds under each act. "in such manner and upon such terms as the common council or hoard of commissioners shall deem for the best interests of such

city." Throughout the constitution and statutes pertaining to municipal corporations of every kind is the principle or policy of disposing of public franchises, of selling public property and of spending public money by competitive bidding after reasonable advertisement and opportunity for anyone to submit appropriate offers. Any contract of a city of the third class for work or supplies or rendition of service to the city must be let by the council or commissioners on advertisement and competitive bidding where over \$500 is involved. Sections 3440, 3480b-2, Kentucky Statutes; Moseley Hospital v. Hall, 207 Ky. 644, 269 S.W. 1004. The failure to give opportunity to others to bid upon proposed bonds, and the making of a private sale before they had been authorized could not be ratified by the city commissioners.

It is made to appear that the court has previously approved the issuance of similar bonds without there having been public competitive bidding or an opportunity therefor afforded, and perhaps the validity declared of contracts of sale of such bonds even before the ordinances creating them were passed. Very substantial rights have vested under those decisions. In some instances the bonds have been placed in the hands of the public and their proceeds expended in whole or in part. In others the contracts have been made but there has been no actual delivery of the bonds or payment of the money made. These conditions have resulted from a tacit construction by this court that the provisions of sections 2741L-5, 2741L-27 and 3480d-5, of the Statutes, authorizing the city council or commissioners to sell such bonds "in such manner and upon such terms" as it "shall deem for the best interests" of the city, are complete in themselves and grant unrestricted powers. However, in most of the cases, if not all of them, the records disclosed that the public authorities had submitted proposals to two or more prospective buyers of the bonds, and having informed themselves as to the market for different classes of bonds, proceeded to authorize the issuance of the class most favorable to the city. The case at bar is the first to which our attention has been called wherein but one buyer was approached. It is familiar law that, first the constitution, and second, the Acts of the legislature are deemed to declare the public policy of a state. In the absence of such declaration, the court does so. As above stated, there are broad constitutional and statutory declarations as to public policy in respect to similar municipal transactions, namely, that public business is never a private matter. This case, and the facts disclosed in relation to the bonds under attack, as above stated. indicate a private sale of public obligations, and a procedure fraught with grave danger to the public interests and welfare.

The case quite forcefully presents to the court the need for speaking specifically upon the construction to be given the provisions of the statutes above cited. We think they are to be construed as granting broad discretionary powers to the city councils or commissioners in the creation and sale of such bonds, but not to the extent of avoiding public and reasonable advertisement or a proposal to receive bids or offers for bonds proposed to be issued and sold.

In view of the tacit or implied constructions of the statutes heretofore given, we expressly hold that bonds heretofore issued, and contracts heretofore entered into, or projects now in course of prosecution are not affected by this decision. The declarations herein are to be deemed as applying to any projects hereafter initiated and to the construction or interpretation to be given the statutes and powers of municipalities in the future.

Since the judgment appealed from had the effect of approving the sale of the bonds, it must be reversed to that extent. In all other respects it is affirmed.

Judgment affirmed in part and reversed in part.

Ky. Acts, Extra Session 1945, c. 3, authorizes city and county airport revenue bonds and provides for sale of bonds "in such manner and upon such terms as the legislative body of the Governmental Unit deems best." Does the doctrine of the Corbin case control notwithstanding the quoted language?

The obvious difficulty with judicial regulatory legislation is amply illustrated by the Kentucky court's enactment that municipal bonds be disposed of at public sale. What sort of notice and what procedure as to receiving and acting upon bids will meet the requirement? Might the city reject all bids and then sell at private sale?

In New Jersey it has long been the practice to review directly by certiorari the substantive validity of legislative acts of local governing bodies. See, for example, Brookdale Homes, Inc., v. Johnson, 123 N.J.L. 602, 10 A.2d 477 (1940), affirmed 126 N. J.L. 516, 19 A.2d 868 (1941).

SECTION 2. STATE-LOCAL RELATIONS

A. STATE CONTROL OF LOCAL ORGANIZATION AND OBJECTIVES

The various units of local government are creatures of state policy. The organic law may itself articulate policy with respect to one or more aspects of the subject. To the extent that the constitution is silent, policy determination will rest with the policy-making branches, the legislature and the executive. It is elementary constitutional theory that the power of the legislature is plenary except as restricted by (1) the Federal Constitution, (2) the State Constitution and (3) by limitations arising out of the nature of the federal system. The third class of limitation may be reserved for consideration under the head of federal-local relations for it is there that we find it in practical application.

(1) Legislative Supremacy

The United States Supreme Court has made it guite plain that state legislatures are supreme over local government so far as the Federal Constitution is concerned, and that is so whether the interests involved are labeled "governmental" or "proprietary" by the state courts. City of Trenton v. State of New Jersey, 262 U.S. 182, 43 S.Ct. 534 (1923) (due process of law clause of Fourteenth Amendment and contract clause of Article I. Section 10): City of Newark v. State of New Jersey, 262 U.S. 192, 43 S.Ct. 539 (1923) (equal protection of the laws clause of Fourteenth Amendment). The Trenton case involved a state statute which required payment to the state for water diverted from streams by any municipality for a public water supply in excess of a certain maximum. Trenton had, prior to the enactment of the statute. acquired from a private water company the right granted to the corporation by the state to divert an unlimited amount of water from the Delaware River without charge. The city pressed upon the Court the contention that provision of a municipal water supply was a proprietary function which put the city on the footing of a private corporation for purposes of the case. The Court rejected the governmental-proprietary distinction as a strictly judicial creation, which furnished no basis for a municipality invoking such constitutional restraints as the due process clause against the state. In Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 40, 53 S.Ct. 431, 432 (1933) Mr. Justice Cardozo laid it down flatly that a municipal corporation "has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." In that case Baltimore unsuccessfully challenged, under the equal protection

clause, a state law exempting a railroad from ad valorem taxation by the city.

MONAGHAN v. ARMATAGE

Supreme Court of Minnesota, 1944. 218 Minn, 108, 15 N.W.2d 241; appeal dismissed 323 U.S. 681, 65 S.Ct. 436 (1945).

LORING, CHIEF JUSTICE. The plaintiff-appellant brought this suit to restrain the Minneapolis park board from transferring the possession and use of the municipal airport in that city to the Minneapolis-St. Paul Metropolitan Airports Commission created under authority of L.1943, c. 500. That act is discussed in Erickson v. King, 218 Minn. 98, 15 N.W.2d 201 filed herewith. The commission intervened in support of the defendants' demurrer to the complaint on the ground that it did not state a cause of action.

In this case the contentions of the appellant are that L.1943, c. 500, is special legislation in violation of Minn. Const. art. 4, §§ 33, 34, and that it attempts to take from the city of Minneapolis its property in the municipal airport without compensation, in violation of the due process clause of U.S.Const. Amendment XIV, as well as Minn.Const. art. 1, § 13, which forbids the taking of private property for public use without just compensation.

- 4. We come now to the contention that the transfer of the use and possession of the municipal airport from the city park board to the commission is a taking without compensation. For the reasons stated under paragraph 5 of this opinion, the taking is not the taking of private property in violation of Minn.Const. art. 1, § 13.
- 5. The remaining question is whether Minneapolis has such a proprietary interest in the airport that its use and possession cannot be taken without compensation by the state acting through the commission authorized by c. 500. Is the city, as a state agency for the exercise of governmental powers, in a position to invoke the Fourteenth Amendment as against the state itself or its agency duly created and empowered by the legislature to take over the possession and use of municipal property?

A municipality is merely a department of the state, a political subdivision created as a convenient agency for the exercise of such governmental powers as may be entrusted to it. City of Trenton v. New Jersey, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937, 29 A.L.R. 1471. Absent constitutional restriction, the legislature may at its pleasure modify or withdraw any powers so entrusted to a city, hold such powers itself, or vest them in other agencies. Hunter v. City of Pittsburgh, 207 U.S. 161, 178, 179, 28 S.Ct. 40,

46, 52 L.Ed. 151, 159, cited with approval in City of Trenton v. New Jersey, supra.

Minn.Const. art. 4, § 36, specifically preserves the right in the legislature to provide general laws paramount to homerule charters. See State ex rel. Smith v. City of International Falls, 132 Minn. 298, 156 N.W. 249; State ex rel. Erickson v. Gram, 169 Minn. 69, 210 N.W. 616.

The United States Supreme Court, speaking through Mr. Justice Butler in City of Trenton v. New Jersey, supra, said, 262 U.S. 188, 43 S.Ct. 537, 67 L.Ed. 941:

".... This court has never held that these subdivisions may invoke such restraints [the Fourteenth Amendment and the contract clause] upon the power of the state."

It further said in the same case (262 U.S. 189, 43 S.Ct. 537, 67 L.Ed. 942), speaking of Town of East Hartford v. Hartford Bridge Co., 10 How. 511, 533, 534, 536, 51 U.S. 511, 533, 534, 536, 13 L.Ed. 518, 527–529:

". . . The reasons given in the opinion (10 How. [at pages] 533, 534, 13 L.Ed. 518) support the contention of the state here made that the City cannot possess a contract with the state which may not be changed or regulated by state legislation." . . .

A city holds its property for public purposes whether in furtherance of a proprietary or governmental purpose. It holds it subject to the paramount power of the legislature, whose creature it is. The answer to the question before us becomes simple in the light of a realization that the city is but a subdivision of the legislative branch of government and always subject to the paramount power of the legislature, its creator. The legal situation is no different from that where the state itself holds the property and subjects it to a different or greater use.

In State ex. rel. School District v. County Board, 126 Minn. 209, 212, 148 N.W. 53, 54, this court said:

". . . The case is controlled by the further rule that the Legislature, having plenary control of the local municipality, of its creation and of all its affairs, has the right to authorize or direct the expenditure of money in its treasury, though raised for a particular purpose, for any legitimate municipal purpose, or to order and direct a distribution thereof upon a division of the territory into separate municipalities. . . The local municipality has no such vested right in or to its public funds, like that which the Constitution protects in the individual, as precludes legislative interference. People v. Power, 25 Ill. 187; State Board [of Education] v. City, 56 Miss. 518. As remarked by the supreme court of Maryland in Mayor v. Sehner, 37 Md. 180: 'It is

of the essence of such a corporation, that the government has the sole right as trustee of the public interest, at its own good will and pleasure, to inspect, regulate, control, and direct the corporation, its funds, and franchises."

We therefore hold that c. 500, in authorizing the transfer of the use and possession of the municipal airport to the commission without compensation to the city or to the park board, does not violate the Fourteenth Amendment to the Constitution of the United States.

Order affirmed.

On Petition for Rehearing.

PER CURIAM. Appellant now challenges the constitutionality of Ch. 500 as contravening Minn.Const. art. IV, § 34, which provides that "all such laws shall be uniform in their operation throughout the State." We find no lack of uniformity in the application of Ch. 500. It not only applies to all present and future contiguous cities of the first class, but includes provisions for support of municipal airports which further the objectives of the act. Of course, if the appropriation made by the act is exhausted the legislature may or may not enlarge it as it is advised, but so long as the appropriation is available it appears it is applicable uniformly throughout the state. The legislature need not provide at this time for all future commissions which may come under the law.

Nor do we see any violation of the Fourteenth Amendment to the federal constitution, since we see no infringement of the equal protection clause. All are treated alike who come within the act.

Petition denied.

See E. B. Schulz, "The Effect of the Contract Clause and the Fourteenth Amendment upon the Power of the States to Control Municipal Corporations" 36 Mich.L.Rev. 385 (1938).

Notwithstanding the widely-accepted theory that state legislative power is plenary a few courts have embraced the view that there is some sort of inherent right to local self-government, which exists quite apart from express constitutional guaranty or reservation. This exceptional doctrine stems largely from a separate opinion of Judge Cooley, a jurist of great distinction, in People ex rel. Le Roy v. Hurlbut, 24 Mich. 44 (1871). The case involved an attack on the validity of a statute which placed control of Detroit public buildings, other than schools, and of the City's streets, parks, waterworks and sewer system in a board of public works, the first members of which were appointed directly by the statute. The Michigan constitution provided that city officers

should be elected or appointed "at such times and in such manner as the legislature shall direct." In opinions rendered seriatim all the judges agreed that direct legislative appointment offended this provision, but Judge Cooley went on to assert at length the idea that there is a historically-grounded independent "right" in local government to choose those who are to administer local affairs. Two well-known commentators have embraced the "inherent right" theory with vigor. Amasa M. Eaton, "The Origin of Municipal Incorporation in England and the United States" 25 Rep.Am.Bar Ass'n 292 (1902); "The Right to Local Self-Government" 13 Harv.L.Rev. 441, 570, 638, 14 Id. 20, 116 (1900-1901); and Eugene McQuillin, "Constitutional Right of Local Self-Government of Municipalities" 35 Am.L.Rev. 510 (1901). The notion is reiterated with a sort of dogged chauvinism in the latest edition of McQuillin on Municipal Corporations. See Revised Vol. 1 §§ 91, 188 et seg. and 267 et seg. (1940). Professor H. L. Mc-Bain, with equal vigor, has attacked the "inherent right" doctrine as unhistorical and entirely incompatible with American constitutional theory. McBain, "The Doctrine of an Inherent Right of Local Self-Government" 16 Col.L.Rev. 190, 299 (1916).

In 1889 Indiana embraced the "inherent right" doctrine without benefit of any pertinent constitutional provision. State ex rel. Jameson v. Denny, 118 Ind. 382, 21 N.E. 252 (1889), and companion cases. It was re-affirmed in 1902. State ex rel. Geake v. Fox, 158 Ind. 126, 63 N.E. 19 (1902). These cases, like the Hurlbut case, involved statutes setting up, in one instance, an independent public works board with control over streets, sewers and public buildings and, in three others, boards controlling police and fire department functions, and providing for appointment of members by the legislature or the governor. Both in the Michigan and Indiana cases the right to choose local officers was recognized only as to those deemed to be performing local, as distinguished from general or state functions in the performance of which a local unit served as an arm of the state. A police force is engaged in a state function, says the Indiana court. The business of a fire department, however, is local. Since the provisions of the acts, creating, single police and fire boards, were considered inseparable, the entire acts were declared invalid. The opinions. unfortunately, do not leave off after making the distinction between state and local functions. Resort is had also to such labels as "private" and "corporate," in contradistinction to "governmental." The Indiana court employed these labels. The Iowa court did likewise when, in 1902, it applied the doctrine to strike down a statute setting up a court-appointed city board of water works trustees. Separation of powers was also invoked. State ex rel. White v. Barker, 116 Iowa 96, 89 N.W. 204 (1902). The

Kentucky Court of Appeals in the same year seized upon like verbiage when it not only adopted the "inherent right" doctrine but applied it to a subject other than the selection of local officers. In City of Lexington v. Thompson, 113 Ky. 540, 68 S.W. 477 (1902), a statute fixing the pay of members of a city fire department was declared invalid. As indicated in Campbell v. Board of Trustees of Fireman's Pension Fund, 235 Ky. 383, 31 S.W.2d 620 (1930), the invalidation of the statute could have been grounded upon an express constitutional provision. In a still later case, however, the court ignored that possibility in simply relying on the Thompson case as authority for invalidating a statute fixing a minimum salary for city waterworks commissioners. Board of Aldermen of City of Ashland v. Hunt, 284 Ky. 720, 145 S.W.2d 814 (1940).

As to the vitality of the doctrine in Indiana see Harry T. Ice, "Municipal Home Rule in Indiana" 17 Ind.L.J. 375 (1942).

It remained for Montana to exhibit the "inherent right" doctrine in all its logical perfection.

STATE OF MONTANA ex rel. KERN v. ARNOLD

Supreme Court of Montana, 1935. 100 Mont. 346, 49 P.2d 976, 100 A.L.R. 1071.

Anderson, Justice. Relators, individually and as members of the fire department of the city of Missoula, brought this action as an original proceeding in this court, seeking a writ of mandate to compel the mayor and councilmen of the city to comply with the provisions of chapter 49 of the Laws of 1935.

It is alleged in the petition that the city of Missoula was incorporated under the laws of the territory of Montana as a municipal corporation in 1889; that it has a population in excess of 10,000, and less than 25,000, and is operating under the commission form of government; that the respondents are, respectively, the mayor and councilmen of the city of Missoula; that the personnel of the city fire department is composed of the relators; that the fire department is divided into two platoons, pursuant to the provisions of chapter 91 of the Laws of 1917 and acts supplementary thereto; that eight of the members of the fire department are receiving a salary of less than \$150 per month; that the respondents have refused to obey the provisions of chapter 49, supra, and have announced that they will continue to maintain the 2-platoon system and require the relators to work in excess of 8 hours per day; and will continue to refuse to pay those members of the fire department the sum of \$1,800 per year, who are now receiving a lesser sum.

The pertinent portion of chapter 49, Laws of 1935, provides: "On and after July 1st, 1935, in cities of the first and second classes, the City Council, City Commission, or other governing body, shall divide all members of the paid Fire Department, except the chief thereof, into platoons of three shifts. The members of each shift shall not be required to work or be on duty more than eight (8) hours of each consecutive twenty-four hours, except in the event of a conflagration or other similar emergency when such members or any of them may be required to serve so long as the necessity therefor exists. Each shift shall be changed once every two weeks. (Each member shall be entitled to at least one (1) day off duty out of each eight-day period of service without loss of compensation.) No member of a paid Fire Department of a city of the first or second class shall engage in any occupation of any other kind whatsoever. Members of paid Fire Departments of cities of the first class shall each receive a minimum salary of Eighteen Hundred Dollars (\$1,800.00) per annum, payable in equal monthly installments. Members of paid Fire Departments of cities of the second class shall suffer no reduction in salary on account of the operation of this Act, provided that this Act shall not be operative as to cities of the second class unless the City Council, City Commission or other governmental body thereof shall by ordinance adopt same." Section 1.

The respondents have appeared by motion to quash and by answer. The motion to quash is based upon the ground that the petition fails to state facts sufficient to constitute a cause of action. The answer admits the facts detailed, supra. It is also alleged that chapter 49 violates certain constitutional provisions, which we will presently notice so far as may be necessary. . . .

In the case of State ex rel. City of Missoula v. Holmes, 47 P. (2d) 624, decided June 27, 1935, speaking with reference to the powers of cities, we said: "The powers granted to a municipal corporation are of two classes. 'The first including those which are legislative, public, or governmental and import sovereignty; The second are those which are proprietary, or quasi private, conferred for the private advantage of the inhabitants and of the city itself as a legal person.' Campbell v. City of Helena, 92 Mont. 366, 16 P.2d 1, 2; State ex rel. Brooks v. Cook, 84 Mont. 478, 276 P. 958; Griffith v. City of Butte, 72 Mont. 552, 234 P. 829; Milligan v. City of Miles City, 51 Mont. 374, 153 P. 276, L.R.A. 1916C, 395. . . . In the case of Hersey v. Neilson, supra [47 Mont. 132, 131 P. 30, Ann.Cas.1914C, 963], this court, speaking with reference to the power of the legislature over municipal corporations, said: 'Because of its autonomous character—its en-

joyment of a large measure of organic independence—the municipal corporation is relieved to a considerable extent from officious, meddlesome legislation which seeks to interfere with its private or proprietary functions. The theory of local self-government for municipal corporations is firmly established in this state. Helena Con. Water Co. v. Steele, 20 Mont. 1, 49 P. 382, 37 L.R.A. 412; State ex rel. Gerry v. Edwards, 42 Mont. 135, 111 P. 734, 32 L.R.A., N.S., 1078, Ann. Cas. 1912A, 1063.' As to the first class of powers of a city enumerated above, the power of the legislature is supreme except as limited by express constitutional prohibitions; but as to the powers of the second class wherein the city is acting in a proprietary capacity, as distinguished from a governmental capacity, the theory of local government controls."

If in owning the equipment and property used in a fire department and in employing firemen the city is acting in its proprietary capacity, then the act in question, which of necessity requires the city to employ additional firemen at additional expense and to pay others additional compensation, operates to deprive the city of property without due process of law in contravention of the provisions of section 27 of article 3 of the Constitution. If, on the other hand, when engaged in these activities the city is exercising a governmental function, the will of the Legislature is supreme. State ex rel. City of Missoula v. Holmes, supra. . . .

It is argued that by the great weight of authority a fire department maintained by a municipal corporation is classified as the exercising of a governmental function in cases where it was sought to hold the municipality liable for failure to secure proper equipment to extinguish fires and to maintain an adequate water supply for that purpose, and where it was sought to hold the city responsible for the negligence of firemen in the operation and use of equipment while attempting to extinguish fires, or in testing apparatus maintained for that purpose. . . .

As pointed out, supra, this state, along with the courts of some other, has adhered to the theory of local self-government, or home rule, which has had the effect of classifying the functions of a municipal corporation as being proprietary to a greater degree than has been observed by the courts of other jurisdictions not applying this rule. In general, in those states which have applied the theory of local self-government to the same extent as we have, it is held that acts of the Legislature attempting to fix the amount of compensation to be paid firemen, to direct the levy of a compulsory tax for a firemen's pension fund, and attempts to regulate the hours of employment of firemen which would not be valid as an exercise of the police power, are an undue invasion

of the rights of the municipalities on the theory that the establishment and maintenance of a fire department is a proprietary function. City of Lexington v. Thompson, 113 Ky. 540, 68 S.W. 477, 57 L.R.A. 775, 101 Am.St.Rep. 361; Campbell v. Board, 235 Ky. 383, 31 S.W.2d 620; City of Evansville v. State, 118 Ind. 426, 21 N.E. 267, 4 L.R.A. 93; State ex rel. Geake v. Fox, 158 Ind. 126, 63 N.E. 19, 56 L.R.A. 893; Davidson v. Hine, 151 Mich. 294, 115 N.W. 246, 15 L.R.A., N.S., 575, 123 Am.St.Rep. 267, 14 Ann.Cas. 352; Simpson v. Paddock, 195 Mich. 581, 161 N.W. 898.

As disclosed by our statutes, the establishment of a fire department is voluntary on the part of the city, and likewise it is there declared that the firemen are not officers of the city. The apparatus and equipment used by a fire department are the property of the city. The greator portion of the time of fireman when on duty is devoted to holding themselves in readiness to answer a call if the necessity arises, and during such waiting periods they are not exercising any function on behalf of the city, but rather the city is exercising its proprietary right over their time.

We conclude that a city operates a fire department in its proprietary capacity, except when the fire department is engaged in the extinguishment of fires, going to and from the scenes of such conflagrations, or in testing equipment for use on such occasions, etc.; then it may be said on the ground of public policy based largely upon grounds of necessity, as demonstrated by the quotation, supra, from the case of Wilcox v. Chicago, supra, that it is exercising governmental functions.

If the Legislature had made it compulsory on cities of the first and second class to maintain a fire department, then legislation such as here under consideration would not be subject to some of the existing constitutional objections.

Therefore, when the Legislature attempts to set up a compulsory 3-platoon system and dictates the compensation to be paid by the municipality to the firemen so employed, the proprietary rights of the city are invaded in a manner which cannot be justified under the police power of the state, and on the authority of State ex rel. City of Missoula v. Holmes, supra, it is deprived of its property without due process of law.

Accordingly, we must hold that the act in question is unconstitutional and void.

The petition is dismissed and the writ denied.

With the Kern case should be considered State ex rel. Helena Housing Authority v. City Council of City of Helena, 108 Mont. 347, 90 P.2d 514 (1939). The housing authority obtained mandamus requiring the city council to appropriate funds, in compliance with statute, to pay the preliminary expenses of the authority. The housing contemplated by the housing authority law had previously been found to be for a public purpose in the sense that a public agency could undertake it. In order to distinguish the Kern case this concept of "public" purpose was translated into "governmental" and the way thus paved for concluding that the state could require municipal outlay for the purpose. Obviously, a fire department's business involves a public purpose. Yet we find that venerable activity to be less governmental than the new function of providing low-cost housing. It remains unexplained, moreover, why, in the interest of the firemen and the members of the public safeguarded by them, the police power does not extend to requiring eight-hour duty periods in place of twelve-hour shifts.

In the Kern case the court invoked the state due process clause. The property of which the city was being deprived was not identified. Presumably, the court had in mind merely that it would cost the city more to replace a two-platoon with a three-platoon fire department. But that merely meant that the city would have to exercise the delegated governmental power of taxation more onerously to meet the extra expense. Is that a deprivation of property? If the city is to be deemed to be merely representative of its taxpayers, what standing do they have to assert that a heavier tax for an admittedly public purpose takes their property without due process? See H. L. McBain, "Due Process of Law and the Power of the Legislature to Compel a Municipal Corporation to Levy a Tax or Incur Debt for a Strictly Local Purpose" 14 Col.L.Rev. 406 (1914). The "inherent right" doctrine is the controlling element; without its guaranty to the local unit of freedom of choice the due process argument would be quite unintelligible. This, it is believed, is the true explanation of the doctrine, supported by a few decisions and much dicta, that the legislature is precluded by due process requirements from compelling a municipality to levy a tax or incur a debt for a strictly local purpose. The legislature may, absent constitutional limitations. authorize the local tax or debt. That is obvious. But compulsion, it is said, will not do. What is wrong then is the political process involved. This is a strange setting for due process of law. The doctrine was supported, however, by no less an authority than Judge Dillon. 1 Dillon, Mun. Corps. §§ 119, 120 (5th ed. 1911).

The "inherent right" concept has in one or two instances cropped up in the "no taxation without representation" formula. Thus, the Iowa court struck down a statute which gave a municipal library board appointed by the mayor and council, the power to determine the tax to be levied for library purposes. State ex rel. Howe v. Mayor, etc., of City of Des Moines, 103 Iowa 76, 72 N.W. 639, 643, 644 (1897). The court relied on general principles in refusing "to extend" the authority to delegate the taxing power "to any body or person not directly representing the people."

In a recent case involving county government, the Pennsylvania Supreme Court relied upon "inherent right" theory to overcome the presumption of constitutionality but actually rested its decision upon a particular constitutional provision. Commonwealth ex rel. Smillie v. McElwee, 327 Pa. 148, 193 A, 628 (1937).

People v. Lynch, 51 Cal. 15 (1875), has been put forward as embracing the "inherent right" doctrine. John C. Peppin "Municipal Home Rule in California" 30 Cal.L.Rev. 1, 30 et seq. (1941). California adopted constitutional municipal home rule in 1879. There is no indication that "inherent right" theory has had any vitality there since that time.

It is not without significance that the New England States, which cradled town meeting government, uniformly embrace the doctrine of legislative supremacy. See Amyot v. Caron, 88 N.H. 394, 190 A. 134 (1937); and City of Providence v. Moulton, 52 R.I. 236, 160 A. 75 (1932), both citing other cases. It will be remembered, moreover, that in Connecticut and Rhode Island town government antedated central colonial government.

In Ohio where constitutional municipal home rule obtains it has been held that the fire department of a city is a matter of statewide concern and a statute establishing a platoon system is valid and controlling. State ex rel. Strain v. Houston, 138 Ohio St. 203, 34 N.E.2d 219 (1941). It appears to be the prevailing view in home rule states that the conduct of a fire department is a state concern. See Note 141 A.L.R. 903 (1942).

(2) State Constitutional Limitations upon Legislative Power— Bans upon Special Legislation—Classification

The decisions of the United States Supreme Court control the state courts, of course, in the application of the due process and contract clauses of the Federal Constitution. Similar clauses commonly appear in state constitutions and, as to them, the state courts have the final word. It is not surprising that cases have arisen in which local governmental units successfully invoked these provisions against the parent states, nor that the cases em-

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phasize the much-asserted dual personality of municipalities. The due process issue is probably most sharply drawn in a situation involving a statute requiring transfer of property of a local unit to private hands without compensation.

PROPRIETORS OF MOUNT HOPE CEMETERY v. CITY OF BOSTON

Supreme Judicial Court of Massachusetts, 1893. 158 Mass. 509, 33 N.E. 695.

Petition by the Proprietors of Mt. Hope Cemetery, a corporation organized under chapter 265 of the Acts of 1889, for a writ of mandamus to compel the city of Boston to transfer to it the Mt. Hope Cemetery property as required by said act. . . .

ALLEN, J. Over property which a city or town has acquired and holds exclusively for purposes deemed strictly public,—that is, which the city or town holds merely as an agency of the state government for the performance of the strictly public duties devolved upon it,—the legislature may exercise a control, to the extent of requiring the city or town, without receiving compensation therefor, to transfer such property to some other agency of the government, appointed to perform similar duties, and to be used for similar purposes, or perhaps for other purposes strictly public in their character. Thus much is admitted on behalf of the city, and the doctrine is stated and illustrated in many decisions. Weymouth & B. Fire Dist. v. County Com'rs, 108 Mass. 142; Whitnev v. Stow, 111 Mass. 368; Rawson v. Spencer, 113 Mass. 40; Stone v. Charlestown, 114 Mass. 214; Kingman, Petitioner, 153 Mass. 566, 573, 27 N.E. 778; Meriweather v. Garrett, 102 U.S. 472; Mayor, etc., of Baltimore v. State, 15 Md. 376. By a pretty general concurrence of opinion, however, this legislative power of control is not universal, and does not extend to property acquired by a city or town for special purposes, not deemed strictly and exclusively public and political, but in respect to which a city or town is deemed rather to have a right of private ownership, of which it cannot be deprived against its will, save by the right of eminent domain, with payment of compensation. This distinction we deem to be well founded, but no exact or full enumeration can be made of the kinds of property which will fall within it, because, in different states, similar kinds of property may be held under different laws, and with different duties and obligations. so that a kind of property might in one state be held strictly for public uses, while in another state it might not be. But the general doctrine that cities and towns may have a private ownership of property, which cannot be wholly controlled by the state government, though the uses of it may be in part for the benefit of the community as a community, and not merely as individuals, is now well established in most of the jurisdictions where the question has arisen.

In the case before us, we have to determine whether the city of Boston's title to the Mt. Hope Cemetery is subject to legislative control; and this involves an inquiry, to some extent, into the usages and laws in this commonwealth relating to burying grounds, with a view of ascertaining whether, in the ownership of such property, towns have heretofore been regarded, or have acted, merely as agencies of the state government. . . .

In view of all these considerations, the conclusion to which we have come is that the cemetery falls within the class of property which the city owns in its private or proprietary character, as a private corporation might own it, and that its ownership is protected under the constitution of Massachusetts and of the United States, so that the legislature has no power to require its transfer without compensation. Const. Mass. (Declaration of Rights) art. 1; Const. U. S. 14th Amend.

In judging of the validity of the particular statute under consideration, (St.1889, c. 265), there are other reasons leading to the same result. The first is that the duties of the city in respect to providing a burial place for the poor, and for persons dying within its limits, are not taken away. The city is still bound to provide one or more suitable places for the interment of persons dying within its limits (Pub.St. c. 82, § 9,) and it is still bound to bury its paupers and indigent strangers, (Pub.St. c. 84, §§ 14, 17.) If this cemetery should be conveyed away under the provisions of St.1889, c. 265, the city would be bound to provide another. Certainly the mere continuance of the city's right to bury, in a limited portion of the cemetery, such persons as the law requires it to bury, is not a provision adequate to meet the requirement of Pub. St. c. 82, § 9; and, by the report of facts, the portion referred to is not likely to suffice, even for the burial of paupers, for any great length of time. The city is bound to provide a suitable place for the interment of persons dying within its limits, -not poor persons, only,—but all persons; and the burial of the dead in ground not sanctioned by the city authorities is strictly forbidden. So far as we know, it has never been held that the legislature may require a city or town, without compensation, to transfer property which it has bought in order to enable it to discharge its statutory obligations, while at the same time its duties and obligations continue to rest upon it. On the other hand, it is justly assumed that, if the property is to be transferred, the duties will be transferred. also. Rawson v. Spencer, 113 Mass. 40; Com. v. Plaisted, 148

Mass. 385, 386, 19 N.E.Rep. 224; Whitney v. Stow, 111 Mass. 368; Mayor, etc. of Baltimore v. State, 15 Md. 376. But the duty of burying paupers, and of providing a place for the interment of all persons dying in Boston, is not imposed upon the petitioner. The duties of the city, and the duties of the petitioner under St.1889, c. 265, are not the same.

Moreover, the legislative power over municipal property, when it exists, does not extend so far as to enable the legislature to require a transfer, without compensation, to a private person or private corporation. The control which the legislature may exercise is limited. It must act by public agencies, and for public uses, exclusively. If the city has purchased property for purposes which are strictly and purely public, as a mere instrumentality of the state, such property is so far subject to the control of the legislature that other instrumentalities of the state may be substituted for its management and care; but even the state itself has no power to require the city to transfer the title from public to private ownership. Upon the division of counties, towns, school districts, public property, with the public duty connected with it, is often transferred from one public corporation to another public corporation. But it was never heard of, that the legislature could require the city, without compensation, to transfer its city hall to a railroad corporation, to be used for a railway station, merely because the latter corporation has a charter from the legislature, and owes certain duties to the public.

Petition dismissed.

Wherein does this case differ from a gratuitous legislative transfer to private hands of state, county or municipal property, devoted to plainly governmental uses? Is not the basic question whether public property may be disposed of in that wise? If so, there will be secondary problems, of course, as to who has standing to raise the question.

Property of local units dedicated to public uses may be taken by eminent domain for state purposes. State Highway Commission v. City of Elizabeth, 102 N.J.Eq. 221, 140 A. 335 (1928), affirmed City of Elizabeth v. State Highway Commission, 103 N.J. Eq. 376, 143 A. 916 (1928) (Municipal land used "as a corporation yard by the street department" taken for a state highway). There is no constitutional necessity in such a case that compensation be made. In re Condemnation of Land by Pennsylvania Turnpike Commission, 347 Pa. 643, 32 A.2d 910 (1943) (land of institution district taken for the Pennsylvania Turnpike).

In the absence of governing constitutional limitations, a state may tax the property or activities of a local unit of government,

The courts are disposed, however, to consider tax statutes inapplicable to local units unless the legislative intention that they be taxed clearly appears. Pelouze v. City of Richmond, 183 Va. 805, 33 S.E.2d 767 (1945). This approach has been rejected in favor of taxability in the case of a local activity, deemed non-governmental, which was engaged in for profit. State v. Hamilton County, 176 Tenn. 519, 144 S.W.2d 749 (1940). In 1937 the Indiana gross income tax law was so amended as to cover the income of political subdivisions derived from "private or proprietary activities or business". The tax has been applied to municipal water, gas and electric utilities, markets, a wharf, a golf course, an airport, cemeteries and a swimming pool. See Department of Treasury v. City of Evansville, 223 Ind. 435, 60 N.E.2d 952 (1945), and companion cases. Some form of tax exemption for the property of local governmental units is universal, but such exemptions are usually deemed inapplicable to taxes other than property levies. For a collection of cases see Note 159 A.L.R. 365 (1945).

Constitutional limitations upon legislative action affecting local government consist of (a) various unqualified denials of legislative power, (b) provisions requiring local action or approval and (c) prohibitions upon local and special legislation. The third class is the most important and most appropriate for consideration at this juncture. The others will be briefly noticed here simply to round out the picture. There is no pretense of exhaustive treatment. The provisions of particular constitutions will be referred to as suggestive, not necessarily as typical. It is evident that many of these provisions originated as means of curbing legislative abuses in relation to local government, some of which have been mentioned in the foregoing pages.

- (a) Unqualified denial of legislative power
 - (i) Lending of state credit to local units Mo.Const. of 1945, Art. III:
 - Sec. 39. The general assembly shall not have power: (1) to give or lend or to authorize the giving or lending of the credit of the state in aid or to any person, association, municipal or other corporation;
 - (2) To pledge the credit of the state for the payment of the liabilities, present or prospective, of any individual, association, municipal or other corporation.
 - (ii) Lending of credit of and making of donations by local units

Mo. Const. of 1945, Art. VI:

Sec. 23. No county, city or other political corpora-

scribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this constitution. Sec. 25. No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation,— (an exception in favor of pension payments is omitted).

(iii) Extra compensation to public officers, employees, and contractors

Mo.Const. of 1945, Art. III, § 39:

- (3) To grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part.
- (iv) State levy of taxes for local purposes Mo.Const. of 1945, Art. X:

Sec. 1. The taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes.

This section must be read with Article X, Section 10 (b) which permits general laws providing for the allocation to local units for local purposes of funds collected for state purposes.

(v) Delegation to special commissions of control over municipal facilities or power to perform municipal functions Pa.Const., Art. III:

Sec. 20. The General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever.

The background of this type of provision is found in legislation of the character attacked in the leading "inherent right" cases—legislation which placed control of municipal public works or functions in the hands of special boards or commissions not accountable to the local governing body or electorate. Recently the question has arisen whether a pro-

local housing authority to effect slum clearance through low-cost housing. In both California and Pennsylvania a negative answer has been given. Housing Authority of County of Los Angeles v. Dockweiler, 14 Cal.2d 437, 94 P.2d 794 (1939); Dornan v. Philadelphia Housing Authority, 331 Pa. 209, 200 A. 834 (1938). There is authority, however, that a prohibition of this character prevents state utility commission regulation, of a utility enterprise conducted by a municipality, as to domestic but not as to extra-mural service. See Public Utilities Commission of Colorado v. City of Loveland, 87 Colo. 556, 289 P. 1090 (1930), citing earlier cases.

(vi) Payment of unauthorized claims

Mo.Const. of 1945, Art. III, § 39:

(4) To pay or to authorize the payment of any claim against the state or any county or municipal corporation of the state under any agreement or contract made without express authority of law.

This is, in effect, a denial of power to enact one type of validating or curative statute. The Missouri ban on special and local legislation, as do those of other states, covers meas ures legalizing the unauthorized or invalid acts of state, county or municipal officers. Mo.Const. of 1945, Art. III, § 40 (25). In most instances a validating act would be local or special because it related only to past transactions.

(b) Provisions requiring local action or approval

(i) Street franchises

Mich.Const. of 1909, Art. VIII:

Sec. 28. No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits, without the consent of the duly constituted authorities of such city, village or township; nor to transact a local business therein without first obtaining a franchise therefor from such city, village or township. The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships.

The more common provision on this subject relates simply to street railroad franchises. It will be observed, moreover, that while some extend their benefits to townships, the primary beneficiaries are municipalities and counties are not mentioned. Thus, there is no guaranty to a county of control of suburban streets for which it is responsible. Absent a

may vest authority with respect to utility franchises in streets in the public service commission. City of Geneseo v. Illinois Northern Utilities Co., 363 Ill. 89, 1 N.E.2d 392 (1936). Note the shift in statutory interpretation disclosed in City of Geneseo v. Illinois Northern Utilities Co., 378 Ill. 506, 39 N.E.2d 26 (1941).

(ii) Consolidation, alteration and dissolution of counties; removal of county seats

Mo.Const. of 1945, Art. VI:

- Sec. 3. Two or more counties may be consolidated by vote of a majority of the qualified electors voting thereon in each county affected, but no such vote shall be taken more than once in five years. The former areas shall be held responsible for their respective outstanding liabilities as provided by law. Sec. 4. No county shall be divided or have any portion stricken therefrom except by vote of a majority of the qualified electors voting thereon in each county affected.
- Sec. 5. A county may be dissolved by vote of twothirds of the qualified electors of the county voting thereon, and when so dissolved all or portions thereof may be annexed to the adjoining county or counties as provided by law.
- Sec. 6. No county seat shall be removed except by vote of two-thirds of the qualified electors of the county voting thereon at a general election, but no such vote shall be taken more than once in five years.
- (iii) Local selection of local officers
 - N. Y. Const. (as am'd in 1938), Art. IX:
 - Sec. 7. Except as herein otherwise provided for counties in the city of New York, county officers whose election or appointment is not provided for by this constitution, shall be elected by the electors of the respective counties or appointed by the boards of supervisors, or other county authorities, as the legislature shall direct.
 - Sec. 8. . . . All city, town and village officers, whose election or appointment is not provided for by this constitution shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this constitution, and all officers,

whose offices may hereafter be created by law, shall be elected by the people or appointed, as the legislature may direct.

It is of considerable historical interest that these sections derive from provisions in the first constitution of the state, that of 1777. Section XXIX of that instrument preserved to the "people" the authority to elect town clerks, supervisors, assessors, constables, collectors, and all other officers theretofore elected by them. The other officers elective at that time were aldermen, assistant aldermen, overseers of the poor and surveyors of highways. See Problems Relating to Home Rule and Local Government, Vol. I of Publications of New York State Constitutional Convention Committee 106 (1938).

- (c) Prohibitions upon local and special legislation Mo.Const. of 1945, Art. III:
 - Sec. 40. The general assembly shall not pass any local or special law:
 - (1) authorizing the creation, extension or impairment of liens;
 - (2) granting divorces;
 - (3) changing the venue in civil or criminal cases;
 - (4) regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before courts, sheriffs, commissioners, arbitrators or other tribunals, or providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate;
 - (5) summoning or empaneling grand or petit juries:
 - (6) for limitation of civil actions;
 - (7) remitting fines, penalties and forfeitures or refunding money legally paid into the treasury;
 - (8) extending the time for the assessment or collection of taxes, or otherwise relieving any assessor or collector of taxes from the due performance of their duties, or their securities from liability;
 - (9) changing the law of descent or succession;
 - (10) giving effect to informal or invalid wills or deeds;
 - (11) affecting the estates of minors or persons under disability;
 - (12) authorizing the adoption or legitimation of children;
 - (13) declaring any named person of age;
 - (14) changing the names of persons or places;
 - (15) vacating town plats, roads, streets, or alleys;
 - (16) relating to cemeteries, graveyards or public grounds not of the state;

- (17) authorizing the laying out, opening, altering or maintaining roads, highways, streets or alleys;
- (18) for opening and conducting elections, or fixing or changing the place of voting;
- (19) locating or changing county seats;
- (20) creating new townships or changing the boundaries of townships or school districts;
- (21) creating offices, prescribing the powers and duties of officers in, or regulating the affairs of counties, cities, townships, election or school districts;
- (22) incorporating cities, towns, or villages or changing their charters:
- (23) regulating the fees or extending the powers of aldermen, magistrates or constables;
- (24) regulating the management of public schools, the building or repairing of schoolhouses, and the raising of money for such purposes;
- (25) legalizing the unauthorized or invalid acts of any officer or agent of the state or of any county or municipality;
- (26) fixing the rate of interest;
- (27) regulating labor, trade, mining or manufacturing;
- (28) granting to any corporation, association or individual any special or exclusive right, privilege or immunity, or to any corporation, association or individual the right to lay down a railroad track;
- (29) relating to ferries or bridges, except for the erection of bridges crossing streams which form the boundary between this and any other state;
- (30) where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject.

Obviously, some of the items in this list do not apply to local government. It will be seen, however, that a surprising number do, and a few quite directly. Theoretically, the general clause in item "(30)" covers the whole ground, since the theory underlying all the specific items is that the subject is one which can be adequately dealt with by general law. This is, doubtless why the Michigan Constitution contains only the general clause apart from two special proscriptions set off in separate sections. Mich. Const. of 1908, Art. V, §§ 30–32.

If a given statute is not within any of the specific categories it may still not meet the test of the general clause. In relatively few cases, however, has the general clause been the basis for de-

claring acts invalid. L.N. Cloe and Sumner Marcus, "Special and Local Legislation" 24 Ky.L.J. 351, 366 (1936). The "judiciality" of questions arising under the general clause varies from state to state. Some state constitutions expressly repose confidence in the legislature: others, like Missouri, stipulate judicial review. There is a parallel division of opinion among the courts in states the constitutions of which do not speak to the point. 2 Sutherland, Statutory Construction § 2103 (3rd ed. Horack—1943). The problem is one ill-suited for judicial consideration. The question, "could a general law be made applicable?", does not really call for interpretation and application of existing law but requires a policy determination as to whether the subject is one which could be effectually dealt with by general law. "The problem in last analysis is one of legislative policy, with a wide margin of discretion conceded to the lawmakers". Cardozo, J., in Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 45, 53 S.Ct. 431, 434 (1933). This theory has, in effect, been written into Section 9 of Article IV of the New Jersey Constitution of 1947.

Prohibitions upon local and special legislation do not preclude classification. What constitutes a judicially acceptable basis for classification is an inquiry clouded with diversity. The courts have faced a difficult situation. In more than one state abuse of classification has been a commonplace. The device is the transparent business of couching a measure in general terms with reference to a basis of classification which renders it necessarily local or special in operation and effect. The most common classification factor, in acts relating to local government, has been population. Narrow population groupings above the level of the numerous small municipalities tend to isolate the larger communities, each into a separate class. Such a course in Ohio finally provoked the Supreme Court to destroy the whole classification edifice. State ex rel. Knisely v. Jones, 66 Ohio St. 453, 64 N.E. 424 (1902); State ex rel. Attorney General v. Beacom, 66 Ohio St. 491, 64 N.E. 427 (1902).

Classification in terms of substantial population differences for purposes of municipal or county organization and powers is widely employed without constitutional difficulty. That is true, even though the largest city in the state falls in a class by itself, so long as the classes are open. In actuality the open-end feature may be but an empty shell. If, for example, as is not uncommon, the largest city is in a class by itself, the legislature can preserve the single-member classification by moving up the population minimum when some other municipality approaches it. In Nebraska cities of over 100,000 were in the top class. When Lincoln, the lone member, crossed 150,000 the legislature put a wide gap

between it and units in the next class by moving the floor up to 150,000. Neb.Laws 1937, L.B. 138.

Once such a classification is adopted, should later measures enacted with reference to it be upheld without inquiry as to the relevancy of the population factor to the purposes and provisions of those measures? The population factor has but a rough correlation to community differences, at best, but if it is to be broken down as to any matter affecting the form or functions of local government where could any line be drawn short of reconsidering the basic classification as to every point of difference? The Wisconsin Court was faced with this problem in Christoph v. City of Chilton, 205 Wis. 418, 237 N.W. 134 (1931). By a four-to-three decision a statute authorizing disannexation of farm lands from cities of the fourth class was declared unconstitutional as creating an arbitrary classification. The court permitted the city to assert that the statute denied equal protection of the laws to owners of farms in cities of other classes. That put the case in terms of a classification applicable to individuals as distinguished from units of local government and avoided consideration of the real problem.

If the particular measure under scrutiny uses the basic population classification with respect to a subject other than the organization and powers of local governmental units the court is likely to examine the classification afresh as applied to that measure. Mannini v. McFarland, 294 Ky. 837, 172 S.W.2d 631 (1943).

Once an effective classification of municipalities or counties has been made, will further classification be sustained? In the absence of constitutional provisions addressed to this problem, it may be suggested that the answer will depend upon the classification employed in the statute under scrutiny on the theory that the primary classification is not to be taken as exhausting the possibilities. Monaghan v. Armatage, 218 Minn. 108, 15 N.W.2d 241 (1944) (Act which authorized creation of a metropolitan airports commission to control airports for any two contiguous cities of first class upheld though applicable in fact only to Minneapolis and St. Paul.) The Missouri Constitution, for one, speaks to the point. It requires the legislature to classify counties into not more than four classes and cities and towns into a like maximum and to provide the same powers and restrictions for each class. Mo.Const., Art. VI, §§ 8,15.1 It is further provided, as to counties, that a law applicable to a county shall apply to all counties in its class. This clearly freezes county classi-

¹ It is worthy of note that these Missouri provisions do not specify the basis for classification. That population was the intended basis is a reasonable assumption, however. It fits with the scheme of home rule powers for units above certain population levels.

fication. In an opinion, concurred in as to the present point by only three of seven judges, the Missouri Supreme Court early interpreted the provision as to cities and towns to have this effect. Murnane v. City of St. Louis, 123 Mo. 479, 27 S.W. 711 (1894). The Court has since rejected that position, however, and now will uphold any classification deemed reasonable. City of Lebanon v. Schneider, 349 Mo. 712, 163 S.W.2d 588 (1942). In Wyoming, on the other hand, a similar constitutional provision is construed to preclude subclassification. May v. City of Laramie, 58 Wyo. 240, 131 P.2d 300 (1942). A like result has been reached in California as to a provision which merely requires classification. Mayor and Common Council of the City of Darby v. San Jose, 104 Cal. 642, 38 P. 500 (1894). The basic classification, of course, may be modified.

A peculiar situation exists in Florida. The constitutional prohibition upon special or local laws relating to the incorporation or government of cities and towns is a part of the same sentence which commands the legislature to classify cities and towns according to population and to provide for their incorporation and government, both by general law. The legislature has ignored the mandate and the supreme court has held that so long as the affirmative feature of the provision is not effectuated by enabling legislation the prohibition is not operative. State ex rel. Wilder v. City of Jacksonville, 157 Fla. 276, 25 So.2d 569 (1946). State ex rel. Matthews v. Alsop, 120 Fla. 628, 163 So. 80 (1935). The mandate is, obviously, not judicially enforceable in any direct sense; the prohibition is. To refuse to enforce the latter is to destroy the sanction for the former.

"There can be no proper classification of cities or counties except by population. The moment we resort to geographical distinctions we enter the domain of special legislation, for the reason that such classification operates upon certain cities or counties to the perpetual exclusion of all other." Per Paxson, J., in Commonwealth ex rel. Fertig v. Patton, 88 Pa.St. 258, 260 (1878). Let us suppose that geographical differences bear heavily upon the purpose of a given statute. Why, for example, empower any municipalities other than those situated on navigable waters to operate ferries or build and operate wharves? Geographical classification has been upheld. Monaghan v. Armatage. 218 Minn. 108, 15 N.W.2d 241 (1944) (Unified airport control for contiguous cities); Albright v. Sussex County Lake and Park Commission, 68 N.J.L. 523, 53 A. 612 (1902) (Classification of counties by reference to presence of fresh water lakes of a certain minimum size for purpose of county development or public resorts); State ex rel. Bowker v. Wright, 54 N.J.L. 130, 23 A. 116 (1891) (Cities located on or near the ocean authorized to lay out

beachfront streets, drives and walks); State Board of Health v. Greenville, 86 Ohio St. 1, 98 N.E. 1019 (1912).

In some fifteen states there is a constitutional requirement that all laws of a general nature shall have a uniform operation. This creates no additional problem. If it be assumed that a given subject is general in nature we have the same old problem as to classification; uniformity within the class is enough if the basis for classification is valid. Monaghan v. Armatage, 218 Minn. 108, 15 N.W.2d 241 (1944). 2 Sutherland, Statutory Construction § 2107 (3rd ed. Horack, 1943).

STATE ex rel. FIRE DISTRICT OF LEMAY v. SMITH

Supreme Court of Missouri, 1945. 353 Mo. 807, 184 S.W.2d 593.

Douglas, Chief Justice. This is an original proceeding in mandamus to compel the State Auditor to register bonds in the amount of \$25,000 issued by the Fire District of Lemay in St. Louis County. The auditor refused registration on the ground the act authorizing the incorporation of the fire district and the issuance of the bonds is unconstitutional. We find the bonds should be registered.

The act (Laws 1941, p. 505, Mo.R.S.A. § 13927.1 et seq.) provides for the incorporation of fire districts in counties of 200,000 to 400,000 inhabitants with the power to tax, issue bonds, acquire fire-fighting apparatus, and employ firemen.

An act of the Legislature carries the presumption of constitutionality. The court will not declare an act unconstitutional unless it plainly contravenes the Constitution. Furthermore, the act embraces a proper subject of legislation because fire protection for the public safety is within the police power of the State.

Article IV, Section 53 of the Constitution, Mo.R.S.A., provides:

". . . Where a general law can be made applicable, no local or special law shall be enacted; and whether a general law could have been made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined, without regard to any legislative assertion on that subject."

Is the act a local or special law because it applies only to counties of 200,000 to 400,000 inhabitants? According to its terms the act applies: "Whenever the erection of buildings in any territory located without the corporate limits of any village or city becomes so congested that destruction of said buildings by fire becomes a danger to life and property and that fire prevention measures becomes a public necessity or benefit, if any such

area may be within any county in the State of Missouri, now or hereafter having a population not less that two hundred thousand (200,000), nor more than four hundred thousand (400,000) inhabitants, according to the last United States decennial census, said area may establish and incorporate a fire district under this act in the manner hereinafter provided."

The question of classification is primarily for the Legislature. If there is any reasonable basis for the classification made the court must sustain it. Hull v. Baumann, 345 Mo. 159, 131 S.W. 2d 721.

Population furnishes a proper basis for classification in a general law regulating counties which fall within the class when such classification is reasonable and germane to the purpose of the law. Roberts v. Benson, 346 Mo. 676, 142 S.W.2d 1058. Classification on the basis of population is proper here because population is germane to the purpose of the act, fire protection, in view of the greater likelihood of the spread of fire with the resulting increase in danger and loss in thickly populated areas. The danger against which the act seeks to protect grows out of a density of population. Without exception, so far as we know, fire protection is supplied by incorporated communities. The congested unincorporated areas have the same need for it.

St. Louis County is the only county now within the population bracket stated in the act. Such fact alone does not make the act a special law for the reason the act will also apply to other counties which will attain the same population in the future. Where an act is potentially applicable to other counties which may come into the same class it is not a local law. Roberts v. Benson, 346 Mo. 676, 142 S.W.2d 1058, supra.

Respondent argues the Legislature does not give the right of organizing fire districts to all the congested areas that need it, but only to those areas in counties covered by the act and for that reason the act is arbitrary, and contrary to the rule expressed in State ex rel. Hollaway v. Knight, 323 Mo. 1241, 21 S.W.2d 767 and quoted in Hull v. Baumann, supra [345 Mo. 159, 131 S.W.2d 724], as follows: "But a law general so far as population is concerned may be a special law if the classification made therein is unnatural, unreasonable, and arbitrary so that the act does not apply to all persons, objects, or places similarly situated." This statement is too broad and is not supported by the decisions. Where, as here, population is a reasonable basis for classification it is only necessary that the act apply to all places of the same population designated in the law. The fact there may be congested areas in counties having a different population does not make the act a special law. The discussions leading to opposite conclusions in State ex inf. Gentry v. Armstrong, 315 Mo. 298, 286 S.W. 705; Rose v. Smiley, Mo. Sup., 296 S.W. 815; and State ex rel. Gentry v. Curtis, 319 Mo. 316, 4 S.W.2d 467, are not in harmony with the prevailing rule. Reals v. Courson, 349 Mo. 1193, 164 S.W.2d 306, is not pertinent because the law discussed there was applicable to a single county only and not even potentially applicable to any other.

The act we are considering applies generally to all congested areas similarly situated, that is—situated in counties of the same population bracket. Because there are other congested areas to which the same act might have been applied does not stamp the classification as unreasonable. See City of Lebanon v. Schneider, 349 Mo. 712, 163 S.W.2d 588; State v. Gritzner, 134 Mo. 512, 36 S.W. 39; State ex inf. Crow v. Aetna Insurance Co., 150 Mo. 113, 51 S.W. 413.

Respondent should register the bonds. For that purpose our alternative writ of mandamus is made peremptory and ordered issued.

FEDERAL PAVING CORPORATION v. PRUDISCH

Supreme Court of Wisconsin, 1940. 235 Wis. 527, 293 N.W. 156.

WICKHEM, JUSTICE. The controversy involved in this case has been before the court in the cases of Bechthold v. Wauwatosa, 228 Wis. 544, 277 N.W. 657, 280 N.W. 320, and Federal Paving Corporation v. Wauwatosa, 231 Wis. 655, 286 N.W. 546. In the first case this court held a street paving contract under which plaintiff sought payment for the contract price void for failure to follow statutory prescriptions concerning the letting of bids. In the second, this court held that plaintiff could not maintain an action against the city for restitution of the reasonable value of the paving. Following the last of the two decisions, the legislature enacted sec. 62.215, Stats., which provides as follows:

"Authority to pay for public work done in good faith. (1) Whenever any city shall have received prior to January 1, 1939, and shall be enjoying any benefits or improvements furnished under any contract which shall have been or shall hereafter be declared as imposing no legal obligation upon such city, and which contract was entered into in good faith and was fully performed and the work accepted by the proper city officers, so as to impose a moral obligation upon such city to pay therefor, such city may, by resolution of its common council and in consideration of such moral obligation, pay to the person furnishing such benefits or improvements the fair and reasonable value of such benefits and improvements.

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- "(2) The fair and reasonable value of such benefits and improvements and the funds out of which such payment shall be made shall be determined by the common council of such city. Such payments may be made out of any available funds, and said common council shall have authority, if necessary, to levy and collect taxes in sufficient amount to meet such payment.
- "(3) Where special assessments shall have been levied for the benefits or improvements mentioned in subsections (1) and (2) of this section, the common council of such city may validate such special assessments and apply the proceeds thereof towards payment for such benefits and improvements."

Acting under the authority of this section, the common council of the city of Wauwatosa adopted a resolution authorizing and directing the payment to plaintiff by the proper city officers the sum of \$24,596.78. The resolution recites the necessity of the improvement in question, the fact that plans and specifications were prepared and advertisements for bids had, and bids received of which plaintiff's was the lowest: that the contract was let to the plaintiff and plaintiff fully completed the performance of the contract; that the work was approved and accepted by the city; that the supreme court of the state of Wisconsin has rendered a decision declaring the contract to have imposed no legal obligation upon the city solely because of a failure to publish the advertisement for bids once a week for a full two successive weeks; that the city has enjoyed and is enjoying the benefits of the improvements; that the contract was entered in good faith; and that no payment has been made to the contractor for the improvement; that there rests upon the city a moral obligation to pay for the improvement; and that the city has levied special assessments upon the properties abutting the improvement. It is resolved that the fair and reasonable value of the benefits was \$27,596.78, less \$3,000 which will be required for repair of the pavement; that the special assessments heretofore levied are validated; that the "proper city officials of said city be and they hereby are authorized and instructed to draw and deliver a city order to Federal Paving Corporation in the sum of \$24,576.78, provided the moneys involved now by this resolution be legally payable." A city order was thereupon executed by the city clerk and the comptroller directing the defendant city treasurer to pay the said sum out of the village funds. The comptroller duly certified that there were sufficient funds in the possession of the city to pay the same, and this is still the situation. The city treasurer refused and still refuses to make this payment. The contention of the city treasurer and the intervening defendants was that sec. 62.-215. Stats., is invalid as special legislation under sections 31 and

32 of Article IV, Constitution. The trial court sustained this position and held that while there may be classifications of cities, all classifications must satisfy all of the following requisites: (1) They must be based upon substantial distinctions which make one class really different from another; (2) they must be germane to the purpose of the law; (3) they must not be based upon existing circumstances; (4) the law must apply equally to every member of the class; (5) the characteristics of each class should be so far different from those of other classes as to reasonably suggest the propriety of the substantially different legislation. Johnson v. Milwaukee, 88 Wis. 383, 60 N.W. 270. Upon the basis of rule (3), the trial court concluded that sec. 62.215, Stats., classified cities into those which prior to January 1, 1939, had entered into such contracts as are described in the section and those which after that date had entered such contracts; that the section was based upon existing circumstances and created a closed class; that no sufficient reason existed for the classification; and that the section was to be treated as a special law, void under the provisions of Article IV, sec. 31, sub. 9, which prohibits the legislature from enacting any special or private law "for incorporating any city, town or village, or to amend the charter thereof." Although the matter is not free from difficulty, we conclude that the conclusions of the trial court were sound.

By its terms, sec. 62.215, Stats., applies to all cities, and much of the argument in support of its validity is based upon this cir-That is to say, it is appellant's claim that since cumstance. the section under examination applies to all cities, there is no question of classification and a fortiori no room for the contention that a closed class is created. The difficulty with appellant's contention is that although the terms of the section are in no way restricted, sec. 62.03 excludes from its provisions cities of the first class operating under special charters, and hence sec. 62.215 applies only to cities of the second, third and fourth Thus, we are presented with the question whether a statute applicable only to cities of the second, third and fourth classes, which purports so to amend their charters as to permit these cities to recognize moral obligations arising out of void contracts entered into prior to January 1, 1939, is a special act creating a closed class into which no other municipality may grow. That it does so seems to have been established in Johnson v. Milwaukee, 88 Wis. 383, 60 N.W. 270; Boyd v. Milwaukee, 92 Wis. 456, 66 N.W. 603; Burnham v. Milwaukee. 98 Wis. 128, 73 N.W. 1018; Cawker v. Central B. P. Co., 140 Wis. 25, 121 N.W. 888; and Neacy v. Drew, 176 Wis. 348, 187 N.W. 218. These cases have one circumstance in common. The

curative acts considered in each case applied only to cities of the first class, and the city of Milwaukee is the only city of that class in the state. It will not be necessary to detail the facts of each of these cases. The most striking example is the Neacy case, supra. This was an action by plaintiff as a taxpayer of the city of Milwaukee to recover on behalf of himself and all others similarly situated for the benefit of the city the sum of \$155,204.62, this being the amount theretofore paid by the city of Milwaukee to a concrete products company under a contract involving erection of concrete posts for a municipal lighting system. In previous litigation (Neacy v. Milwaukee, 171 Wis. 311, 176 N.W. 871), this court had held the contract void for the reasons (1) that the commissioner of public works exceeded his authority by exercising power properly vested in the common council; (2) that the contract violated the charter of the city of Milwaukee in that the article contracted for was only capable of being manufactured by patented machines and because certain provisions of the city charter were not complied with; and (3) that there was no competition in the letting of the contract. Shortly after the decision of this court was handed down, chapter 10. Laws of 1920. Sp. Sess., was passed adding to the statutes sec. 925—91a, which provided as follows: "Any contract for the purchase of concrete posts or poles in connection with the municipal lighting system of any city of the first class, however incorporated, which has been entered into prior to September 23, 1916, upon which payments have been made and satisfactory material delivered, and such posts or poles are made by machine covered by patent, which contract has, prior to the first day of May, 1920, been declared invalid due to failure of any such city or its officers to comply with sections 925—90 to 925—91 of the statutes, inclusive, or provisions of the special charter of any such city relating thereto, shall be and hereby is made valid; and all payments previously made thereunder or thereafter to be made thereunder are declared valid and binding on any such city and its officers, any provisions of the charter of any such city or of the statutes notwithstanding."

It was held that this curative act was unconstitutional under Article IV, sec. 31, sub. 9, Constitution, because the act applied only to Milwaukee, could never apply to any other city, and therefore was a special law. The court followed the decision in the Cawker case, supra, which held that an act so drafted was as special to the city of Milwaukee as though the city were expressly named and for that reason was unconstitutional and void as a special act seeking to amend a city charter.

At this point it will be convenient to consider another group of cases which at first sight seem inconsistent with those referred to and give considerable color to plaintiff's contentions. These are Adams v. Beloit, 105 Wis. 363, 81 N.W. 869, 47 L.R. A. 441; State ex rel. Risch v. Board of Trustees, 121 Wis. 44, 98 N.W. 954; Wisconsin Cent. R. Co. v. Superior, 152 Wis. 464, 140 N.W. 79; State ex rel. Bloomer v. Canavan, 155 Wis. 398, 145 N.W. 44; Milwaukee v. Reiff, 157 Wis. 226, 146 N.W. 1130; State ex rel. Binner v. Buer, 174 Wis. 120, 182 N.W. 855. In each of these cases it was held that classification of cities is proper on the basis of population; that the fact that laws pertain only to cities of the first class and that there is only at present one such city do not affect their validity; and that in general the fact that a law applies only to a single class and excludes other classes of cities does not make it a special law repugnant to the constitutional provisions. Thus, in State ex rel. Bloomer v. Canavan, supra, this court said [155 Wis. 398, 145 N.W. 48]: "Neither do we think the law obnoxious to the Constitution because it does not apply to cities of the first class. The classification of cities made by the general charter law has been sustained in numerous cases. So have acts which legislated for one or more of the classes so named. The classification having been made, it is held that the power of the Legislature to legislate for one or more of the classes is quite plenary. although no reason can be advanced why the legislation should be confined to the class or classes covered."

In each of the cases cited, however, the law involved applied not merely to all cities presently in the class but to all cities which might grow into the class. In none of the cases was there any limitation of the law to past facts, which, as in the five cases involving Milwaukee, could be construed to create a closed class and to render the act special for that reason. Once the propriety of classification on the basis of population was settled, no further problem was considered to remain.

Perhaps the most representative of the cases is Wisconsin Central Railway Co. v. Superior, 152 Wis. 464, 140 N.W. 79, 80. Plaintiffs in that case were property owners who were objecting to assessments against their properties to defray the cost of paving an abutting street. The case turned on the validity of ch. 575, Laws of 1911 (sec. 959—35a, Stats.) This statute took away all exemptions from cities of the second class and permitted an assessment for the entire cost of the paving to the full extent of the benefits conferred against abutting property. Up to the time of the enactment of this law property owners in cities of the second class could not be required to pay for the pavement of the street in front of their property with perma-

nent pavement having a concrete foundation to exceed three dollars per square yard for this and former pavement in excess of three dollars per square yard. It was this exemption that was removed. The question stated by the court was, "Can the Legislature single out cities of one class and impose burdens on property owners for street improvements that are more onerous than those imposed on other classes of cities, where it is apparent that no substantial reason exists for making the burdens greater in the one than in some of the others, it being of course conceded that the burdens imposed do not exceed the benefits conferred?" The court said: "We think it was decided that the Legislature might, within certain lines, legislate for a single class of cities, regardless of any question of classification, if the legislation was appropriate for the class legislated for. . . . The law in question is certainly general. Applying as it does to all cities within the class legislated for, it is uniform in its application within the meaning of that term as it has been interpreted in the cases cited."

In addition to the foregoing cases which are grouped together for a reason that will hereafter appear should be considered the case of Schintgen v. La Crosse, 117 Wis. 158, 94 N.W. 84, 87. That case involved the validity of sec. 1210d, stats. 1898, which provided for the reassessment of invalid special assessments for street improvements. This section provided that when a street improvement has been or may hereafter be made in any city and a special assessment made against private property therefor, which assessment is invalid because of the work having been done without authority of law, the city authorities shall proceed to make a new assessment of benefits and damages in the manner required by law. It was objected that so far as it pertains to past assessments the law was void because it constituted improper class legislation and hence was a special or private law and within the inhibition of sec. 31, Article IV, Constitution. The case of Boyd v. Milwaukee, supra, was cited in support of this contention which the court rejected, stating that whether the Boyd case was good law or not, "It does not control this case, in which a law general in its terms, and applicable to every city in the state operating under a special charter, is attacked. It has already been held that cities operating under special charters are ex necessitate a proper constitutional class, and subject to legislation as such. The question of classification is therefore no longer open. The law applies to the entire class, and the fact that all the cities in the class may not be in a situation to make use of its provisions does not make it special or private."

While the court in the Schintgen case refers to the section as applicable to cities operating under a special charter, the law

in fact applies to all void assessments by any municipality. The only restriction to cities operating under special charter comes in the definition of invalidity, the law providing for reassessments where the former assessment was invalid "because of such work having been done without authority of law ther in adopting any part of chapter 40a of the Statutes of 1898 or otherwise." In other words, the invalidity of an attempt to adopt the provisions of the general charter law was simply listed as one of the circumstances which might result in work being done without authority of law and that made applicable to the situation the conclusion of the court that the fact that all cities of the class might not be in a situation to make use of its provisions did not make the law special or private. This, of course, has nothing to do with classification. If a statute in terms applies to all cities, the circumstance that there may be no factual situation in some of the cities upon which it may operate does not disclose an attempted classification, good or bad.

With the authority in this situation, this court in White Construction Co. v. Beloit, 189 Wis, 5, 206 N.W. 908, was called upon to determine the validity of ch. 332, Laws of 1923. This law added to sec. 62.15 a new subsection which provided in substance that any contract heretofore made by any city of the third class with relation to paving which contract was within the power of the city to make if let as provided by law, but which was illegal because defectively let or executed, but which shall have been performed or accepted before performance on direction of the board of public works of the city, actually performed, by the doing of the work and the furnishing of the material, and the work so completed devoted to public use is validated and declared legal as though the requirements of law had been observed in the letting and execution. This case differed from the group of Milwaukee cases only in that Beloit was a city of the third class and that there were at least two and possibly more cities of this class in the state. The court in its opinion describes the act as a curative act and fully reviews the Boyd, Burnham, Cawker and Neacy cases, and holds them applicable to the situation. It also cites the Adams, Risch, Wisconsin Central, Bloomer and Binner cases and treats those as distinguishable, evidently upon the ground that in the latter cases no closed class was created. The White Construction Company case represents the considered judgment of this court upon facts so nearly parallel to this as to leave no escape from the conclusion that a curative act, which validates past transactions or permits recognition of liability on the basis of pre-existing facts, must be made applicable to all municipalities if it is to

escape condemnation as a special act. Any other conclusion would require departing from a well-established rule and over-ruling well-considered cases. This we are not inclined to do, although as an original proposition there is much to be said for the contention that having created a proper classification of cities, curative acts applicable to a class or classes should not be treated as creating a sub-classification or a fortiori a closed class. . . .

Plaintiff contends that neither the city treasurer nor the intervening general taxpayers have any standing to raise the question of constitutionality. We deem this unsound (1) because the resolution directing the treasurer to pay was conditioned upon the lawfulness of the resolution itself, and (2) because, if that portion of the resolution ordering payment out of general city funds is void, so also are the validated assessments, and the loss will fall upon general taxpayers unless they can recover upon the treasurer's bond.

Judgment affirmed, and cause remanded for further proceedings according to law.

Nelson, J., dissents.2

In some states, which permit local and special legislation relating to local government, there are constitutional requirements that publication be made of notice of intention to apply for enactment of a local or special measure. There is evidence of both legislative and judicial disrespect for this type of provision. In North Carolina the Supreme Court, soon after the Constitution of 1868 was adopted, took the position that it would not go back of an enrolled bill to determine whether publication had duly been made. Brodnax v. Groom, 64 N.C. 244 (1870). The General Assembly has, ever since, without the slightest warrant, exploited this judicial restraint by ignoring the publication provision entirely. The court continues to keep hands off. Matthews v. Town of Blowing Rock, 207 N.C. 450, 177 S.E. 429 (1934). In Louisiana the Supreme Court persists in a highly vulnerable interpretation of the pertinent provision of the Constitution of that state. The constitution, in listing subjects as to which local and special legislation is forbidden, includes the creation of corporations and the modification of corporate charters but expressly excepts municipal corporations of not less than 2500 inhabitants. With respect to any subject not enumerated in the list it is required that publication of in-

² The Wisconsin cases are discussed in Note 1941 Wis.L.Rev. 396. The principal case is noted in 1941 Wis.L.Rev. 141.

tention to apply for enactment of a local or special law be made. The court, for publication purposes, treats the exception as to municipalities of 2500 or over as an enumerated item and thus not subject to the publication requirement! State v. Cusimano, 187 La. 269, 174 So. 352 (1937); State ex rel. Fortier v. Capdevielle, 104 La. 561, 29 So. 215 (1901).

(3) Optional Charter Laws

Classification does not alone provide sufficient flexibility in local government. Within a single class of county or municipality there is a long-recognized need for some freedom of choice as to structure and organization. The conventional method of dealing with the problem has been optional charter legislation. Such legislation makes provision for two or more forms of government and permits a local unit to choose between them by local referendum. In form it occupies a middle ground between plain organization under general law and home rule. In substance, it may afford greater genuine local autonomy than a formal devolution of charter-making power. The legality of the device has long since been fought out. Local option was attacked as a violation of the doctrine of nondelegability of legislative power. Instead of saying that to make the operation of a law depend upon a local vote involves permissible electoral participation in policy making, the courts have usually said that the particular measure was complete in itself and a local option election merely a method of determining an extrinsic fact upon which the application of the law depended. See, for example, Adams v. City of Beloit, 105 Wis. 363, 81 N.W. 869 (1900). The theory has also been advanced that a charter referendum is not a legislative act but merely a matter of the acceptance vel non of a charter, which differs from the case of a private corporate charter only in that, in the latter, acceptance is a legal requisite. City of Paterson v. The Society for Establishing Useful Manufactures, 24 N.J.L. 385 (1854).

Local option statutes have been attacked as local or special legislation on the theory that the question must be determined by reference to results and the outcome of local option elections might confine actual application of a measure to perhaps only one local unit. A few older cases in which this theory prevailed have been a source of embarrassment in more recent litigation. If an optional charter statute is local or special why is not the same true of a measure authorizing the issuance of municipal or county bonds subject to approval at a bond election? It is not surprising that some of the earlier cases have been so

effectively distinguished or limited as to render them no obstacle to the use of the local option device. State ex rel. Benson v. Peterson, 180 Minn. 366, 230 N.W. 830 (1930); Commonwealth ex rel. James v. Woodring, 289 Pa. 437, 137 A. 635 (1927). In several states, including Pennsylvania, the optional charter plan now enjoys express constitutional sanction. Pa. Const. Art. XV, § 1. The Louisiana Constitution of 1921 requires the Legislature to provide optional plans for the organization of parochial government, Art. 14, § 3. The mandate has been ignored. At the opposite extreme is New York. N. Y. Const. Art. 9 § 2. The New York Optional County Government Law provides great flexibility and wide range of local choice.

(4) Home Rule

The term "home rule" has an immediate catch-phrase appeal, which may throw a very analytical mind off guard. As a broad political idea, local autonomy, like separation of powers, is a meaningful expression of important political values. Difficulty is confronted when we attempt to employ such oversimplified general ideas as administrative and legal concepts. Since the content of the latter is ultimately for the courts, a very practical aspect of the problem of making provision by positive law for local "home rule" is the likelihood that general language may achieve little more than shift troublesome political problems to the judicial forum. It is significant, moreover, that the judicial tendency to construe local powers narrowly is still discernible in home rule states.

It has been customary to confine the municipal and county home rule terminology somewhat arbitrarily to the local framing and adoption of charters of government. If the chartermaking power comes directly from the constitution, as in California. Ohio and a number of other states, it is called constitutional home rule. If enabling legislation is necessary, as in Michigan, Texas, West Virginia and several other states, the pattern is legislative home rule. These labels do not reveal the true extent of local autonomy, which has been or may be granted. The procedure for exercising constitutional home rule may be so complex or weighted with such exacting electoral requirements that the power is not really available. This seems to have been the case with county home rule in Ohio, as the Ohio constitution has been interpreted by the Supreme Court of the state. See State ex rel. Howland v. Krause, 130 Ohio St. 455, 200 N.E. 512 (1936), discussed in 2 Ohio St.L.J. 309 (1936) and by S. Gale Lowrie in "Interpretation of the County Home

Rule Amendment by the Ohio Supreme Court" 10 U. of Cin. L.Rev. 454 (1936). Again, the constitutional grant may be more form than substance and leave legislative supremacy unimpaired. So it is in West Virginia. W.Va.Const., Art. VI, § 39 (a). An optional charter law, such as the New York Optional County Government Law, may be found to confer more genuine local autonomy than some constitutional home rule provisions.

"From its inception municipal home rule has been primarily directed at freeing cities from irksome legislative control." J. D. McGoldrick, Law and Practice of Municipal Home Rule 1916–1930, 299 (1933). This has been conspicuously true as to large cities, which have sought freedom from the control of the rural interests in the legislatures. It may be doubted, however, that even where special legislation is permissible, there has been much deliberate legislative interposition in recent decades in the government of particular small communities. What happens is casual, unstudied enactment of almost any local measure if sought or approved by the representatives from the district concerned. At the 1947 regular session of the General Assembly of Tennessee the process reached the nadir of legislative irresponsibility. Local bills were passed in blocks.

The following is quoted from the Nashville Tennessean for February 22, 1947:

"In the house Speaker W. B. Lewallen and Chief Clerk Buchanan Loser were more interested in actual experiments with speed up devices than in ascertaining membership attitudes toward speed up plans.

"Passage of local bills traditionally has been an abbreviated procedure. But nobody ever kicks. The process calls for the clerk to mumble the first five names on the roll call and then sing out '65 ayes and no noes.' This is done for each local bill.

"Friday Lewallen and Loser tried the same procedure on whole blocks of bills. It worked. There were no kicks. Rep. Lon Austin (Henderson) was permitted to call up local bills 899 through 904. One abbreviated roll call sufficed for the batch. Rep. George Dorris (Hardeman) called up local bills 905 through 908. Again a single roll call sufficed."

Home rule powers have not been reserved exclusively for metropolitan cities. In some states, there is no population minimum; the power is available to any municipality. In others the minimum is very low. Thus, the West Virginia figure is 2,000. The Missouri Constitution of 1945 draws the line at 10,000.

Local autonomy may be recognized as to one or more of at least four important aspects of local government: (1) official personnel, (2) governmental structure, (3) legislative and admin-

istrative organization and procedure, and (4) substantive powers and functions. It might be thought that home rule as to the first three could be provided without excessive legal complications. Difficulties have arisen even there. Certainly that has been true in Ohio. See the symposium on "Municipal Home Rule in Ohio" 9 Ohio St.L.J. 1 (1948), esp. J. B. Fordham and J. F. Asher, "Home Rule Powers in Theory and Practice" 9 Ohio The fourth involves the distribution of govern-St.L.J. 18. mental powers within a state. If the constitution attempts in broad language to grant autonomy in local affairs, as distinguished from state concerns, the courts are faced "with the almost impossible duty" of determining in which category a given function or activity falls. Note the strong language of Judge Mc-Farland in Ex Parte Braun, 141 Cal. 204, 213, 214, 74 P. 780, 784 (1903). The subject well nigh defies analytical treatment. Historical considerations may help in some cases but times change. Functional adaptability is highly pertinent but to consider it is to thrust the constitutional formula aside and re-examine the distribution policy on the merits. If specification is resorted to with a view to detailing those matters deemed appropriate for local control, flexibility may be sacrificed and the legislature hamstrung in modifying the devolution of governmental powers to meet the needs of a changing society. It has been suggested that notwithstanding this objection some enumeration is advantageous, "especially if care is exercised to include therein only those matters which are likely to remain within the realm of purely local affairs." State-Local Relations, report of the Committee on State-Local Relations of the Council of State Governments 172 (1946). What do we have to go on in determining the bounds of the domain likely to remain purely local? What does the word "purely" add?

Home rule procedure commonly involves the election of a charter board or commission charged with the task of drafting a charter for submission to popular referendum. There are, however, numerous variations. In Missouri, for example, municipal charter commissions are elective while their county counterparts are appointed by the circuit and probate judges of a county. The West Virginia enabling act requires submission of a proposed charter to the Attorney General for determination of its consistency with the constitution and general state law before a charter election is conducted. California requires legislative approval of a county, city or consolidated city and county home rule charter. The legislature exercises a veto power; it can approve or reject but not modify. In New York a city governing body may, by so-called "local law," adopt a charter but the charter commission procedure is also available.

Some form of constitutional recognition of municipal home rule exists in at least nineteen states ³ and of county home rule in at least five. ⁴ The editor had the temerity to suggest sixteen years ago that the home rule movement was out of harmony with modern ideas about public administration, which stress flexibility and adaptability in governmental arrangements at the expense of fixed geographical patterns, with a view to maximum effectiveness in conducting the public business. "The West Virginia Municipal Home Rule Proposal" 38 W.Va.L.Q. 235, 237, 238 (1932). The point has lost none of its force, but it should be frankly noted that interest in home rule, far from waning, has increased in recent years.⁵

Whether a legislature may devolve charter-making power upon a city without benefit of a constitutional home rule provision has been ably discussed by H. L. McBain. See "Delegation of Legislative Powers to Cities" 32 Pol.Sc. Quar. 276 (1917). He cited cases pro and con. In Louisiana a delegation of power to amend charters has existed for many years without serious question.

³ Ariz.Const. Art. XIII, §§ 2 and 3; Calif.Const. Art. XI, § 6 et seq.; Colo. Const. Art. XX §§ 1-6; La.Const. Art. XIV, § 3 (a) (As to East Baton Rouge Parish and the City of Baton Rouge only); Md.Const. Art. XI A (as to Baltimore only); Mich.Const. Art. VIII, § 2 et seq.; Minn.Const. Art. IV, § 36; Mo.Const. Art. VI, §§ 19 and 20; Neb.Const. Art. XI, §§ 2-5; Nev.Const. Art. VIII, § 8; N.Y.Const. Art. IX, §§ 9, 11-13; Ohio Const. Art. XVIII; Okla. Const. Art. XVIII, §§ 2-7; Ore.Const. Art. XI, §§ 2 and 2-a; Pa.Const. Art. XV, § 1; Tex.Const. Art. XI, § 5; Utah Const. Art. XI, § 5; Wash.Const. Art. XI, §§ 10 and 11; W.Va.Const. Art. VI, § 39(a).

In Pennsylvania the legislature has failed to enact enabling legislation necessary to put home rule into effect. Home rule in Nevada seems to have been largely overlooked by students of the subject. Actually, the state supreme court gives legislative home rule uncommon force. See State ex rel. Owens v. Doxey, 55 Nev. 186, 28 P.2d 122 (1934).

At its 1946 session the Virginia General Assembly adopted a measure, which provides a procedure for local framing and adoption in any city of 50,000 or more, of a special charter or form of government to be submitted to the General Assembly for consideration. It is not evident that this is anything more than an improved method of drafting and giving local consideration to a proposed special legislative charter. Va. Acts 1946, c. 122. See also Va.Const. § 117. In 1945 a new article XV, bearing the caption "Home Rule," was added to the Georgia Constitution. What it actually does is make provision for optional charters.

⁴ Calif.Const. Art. XI, § 7½; Md.Const. Art. XI-A; Mo.Const. Art. II, § 18 (a) et seq.; Ohio Const. Art. X, §§ 3 and 4; Tex.Const. Art. IX, § 3.

⁵ The literature of home rule has become quite extensive. In addition to H. L. McBain, The Law and Practice of Municipal Home Rule (1916) and J. D. McGoldrick, the Law and Practice of Municipal Home Rule 1916–1930 (1933) there are articles in the National Municipal Review and in various legal periodicals dealing particularly with the subject as to most of the home rule states. See esp. the series of articles in (1932) 21 National Municipal Review and the symposium on Municipal Home Rule in Ohio, 9 Ohio St.L.J. 1 (1948).

La.Act. 136 of 1898, § 43. See Town of Abbeville v. Police Jury of Vermilion Parish, 207 La. 779, 22 So.2d 62 (1945).

The Wisconsin constitutional provision on municipal home rule (Wis.Const. Art. XI, § 3) has been lauded in a recent study of state-local relations. State-Local Relations, Report of the Committee on State-Local Relations 168, 172–174 (The Council of State Governments 1946). The Wisconsin provision reads, in part:

Cities and villages organized pursuant to state law are hereby empowered, to determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village. The method of such determination shall be prescribed by the legislature.

The cited study assumes that the "uniformity" clause prevents legislative impairment of home rule by resort to the device of classification. This, however, is not the case in Wisconsin for the state supreme court upholds sub-classification within the constitutional classification of municipalities into cities and villages. Barth v. Village of Shorewood, 229 Wis. 151, 282 N.W. 89 (1938). Legislative supremacy is still pretty much the order of the day in that state. Chief Justice Rosenberry made no bones about it. Said he: "It is clear that the provisions of our constitution only slightly restrict the power of the legislature over municipal corporations and those restrictions apply to local affairs." State ex rel. Martin v. City of Juneau, 238 Wis. 564, 571, 300 N.W. 187, 190 (1941).

In the latest instance of state constitutional revision in this country the home rule idea was considered but not adopted. The New Jersey Constitution of 1947 embraces, instead, a scheme of (1) permitting enactment of private, special or local laws regulating the internal affairs of counties and municipalities upon petition of the local governing body and subject to ratification by the local governing body or the electors of a unit, and (2) laying down a rule of liberal interpretation of constitutional and statutory provisions concerning municipalities and counties. Faragraphs 10 and 11 of Section VII of Article IV read as follows:

"10. Private, special or local laws; municipalities and counties.
"Upon petition by the governing body of any municipal corporation formed for local government, or of any county, and by vote of two-thirds of all the members of each house, the Legislature may pass private, special or local laws regulating the internal affairs of the municipality or county. The petition shall be authorized in a manner to be prescribed by general law and shall specify the general nature of the law sought to be passed. Such

law shall become operative only if it is adopted by ordinance of the governing body of the municipality or county or by vote of the legally qualified voters thereof. The Legislature shall prescribe in such law or by general law the method of adopting such law, and the manner in which the ordinance of adoption may be enacted or the vote taken, as the case may be.

"11. Liberal construction of constitutional and statutory provisions concerning municipal corporations and counties; powers of counties and municipal corporations

"The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law."

Cf. the famous statement of Judge Dillon concerning municipal powers. I Dillon, Mun. Corps. § 237 (5th Ed. (1911). See also C. W. Tooke "Construction and Operation of Municipal Powers" 7 Temp. L. Q. 267 (1934) (evincing extraordinary faith in formal canons of interpretation).

MOONEY v. COHEN

Court of Appeals of New York, 1936. 272 N.Y. 33, 4 N.E.2d 73.

Proceeding in the matter of the application of Edward J. Mooney, for a peremptory mandamus order against S. Howard Cohen, president and others, etc., to restrain the defendants from submitting to the electors of the city of New York, at the general election to be held on November 3, 1936, the proposition or question of the adoption of a proposed new city charter. From an order (160 Misc. 537, 290 N.Y.S. 343), granting a peremptory order of mandamus, defendants appeal.

Reversed.

By chapter 867 of the Laws of 1934, Ex. Sess., passed by a two-thirds vote of both houses of the Legislature on an emergency message of necessity (amended by Laws 1935, c. 292, also passed by such a two-thirds vote on an emergency message), the Legislature "created a temporary commission, to be known as the New York city charter revision commission," the members thereof to be appointed by the mayor, directed such commission "to draft a proposed new charter" and to file the same when completed in the office of the city clerk.

Section 4 directs that: "The commission shall provide for the submission of such charter to the electors of the city at a general election or at a special city election held therein after December thirty-first, nineteen hundred thirty-four, but not less than sixty days after the filing thereof in the office of the city clerk."

Section 5 provides that: "At such election that shall be submitted to the qualified electors of the city the following question: 'Shall the charter proposed by the New York city charter revision commission be adopted?' If such question shall receive the affirmative vote of a majority of the qualified electors voting thereon at such election, then such proposed charter shall be the charter of the city of New York and shall become operative and effective at the time and in the manner prescribed therein."

A commission, so appointed by the mayor of the city of New York, drafted a proposed new charter and duly filed it in the office of the city clerk, with a direction that it be submitted to the electors at the general election to be held on November 3, 1936; and the board of elections of the city of New York declared its intention to comply with such direction. . . .

Crane, Chief Judge. That the Legislature may draft a charter or optional forms of government for cities and make their adoption dependent upon the vote of the city electorate has been determined in Cleveland v. City of Watertown, 222 N.Y. 159, 118 N.E. 500, Ann.Cas.1918E, 574.

That the Legislature could not heretofore submit to a city or the electorate of a city the framing of their own charter and its adoption by the vote of its citizens is and was due to the provisions of the Constitution which said: "The legislative power of this State shall be vested in the Senate and Assembly." Article 3, § 1.

It is because of this provision of the Constitution that this court has repeatedly held that the Legislature cannot delegate its authority and pass on its lawmaking functions to other bodies or communities. It cannot abdicate its constitutional powers and duties. Matter of Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co., 191 N.Y. 123–145, 83 N.E. 693, 18 L.R.A., N.S., 713, 14 Ann.Cas. 606.

However, there is another constitutional provision, known as the Home Rule provision of the Constitution, which has restricted the legislative powers of the Senate and the Assembly, and has vested power in the cities. Article 12 of the Constitution provides that as to the "property, affairs or government of cities" (section 2), the Legislature shall not pass any law which shall be special or local either in its terms or in its effect. It may pass general laws, affecting all cities alike, but it cannot pass any local law—

such for instance, as a law relating to the city of New York which touches the property, affairs or government of that city except on emergency message. In other words, the legislative power is now limited in this particular.

What has been the result of this constitutional amendment? We have a body of laws enacted by the city authorities which are just as binding as the acts of the Legislature of the state of New York and which have been enacted under this provision of the Constitution. These are laws which affect the property, affairs, or government of the city. Browne v. City of New York, 241 N.Y. 96, 149 N.E. 211. Under the old Constitution, this would have been illegal. The Legislature could not give the cities any such power as it would have been an abdication of its own duties and delegation of its functions.

The Legislature was the lawmaking body. This has been changed in part by the constitutional amendments. The Municipal Assembly has become the legislative body for the city of New York, and passes laws like the Legislature. For instance, the lawmaking body of the city of New York, the Municipal Assembly, could prepare a charter or a change in the form of city government and submit it to the people for approval under the authority of Cleveland v. City of Watertown, supra.

In fact, this is what section 20 of the City Home Rule Law (Consol.Laws, c. 76, Laws of 1924, c. 363) provides. This section deals with "a new charter" and authorizes the legislative body of a city to submit to the electors the proposition of having a Charter Commission, and if this be voted then the legislative body is authorized to submit the proposed charter to the electors for approval. The respondent finds no fault with this law, but insists, in fact it is his main point, that as the legislative body of the city has the right to submit a new charter to the electorate, the Legislature of the state has no authority to authorize a Charter Commission to do it.

The respondent overlooks the power which is reserved to the Legislature over cities. By a general law or by an emergency local law, the Legislature can change the agency for the submission of a city charter from the legislative body to a commission. The Constitution of the state provides that the legislative power of the state shall rest in the Senate and Assembly. There is no constitutional provision that the legislative body for passing ordinances or laws of a city shall rest in an assembly or a board of aldermen or any other body, and we find no such provision in the Home Rule Amendment. Section 3 of article 12 gives to every city the power to adopt and amend local laws, not inconsistent with the Constitution and laws of the state, relating to many matters which are therein considered to be the property,

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affairs, or government of the city. No limitation is here found upon the method by which these local laws shall be adopted, and no replica of the State Senate and Assembly is necessary.

The city, therefore, having the power—and it is conceded—to amend the charter, the Legislature of the state could designate the agency to exercise the power. This it has done by the law in question (Laws 1934, Ex.Sess., c. 867, amended Laws 1935, c. 292) authorizing the mayor to appoint a commission to revise the charter instead of having it done under the Home Rule Law, § 20, by the local legislative body.

The interpretation which the respondent places upon section 3 and section 5 of article 12 of the State Constitution is entirely too rigid. The last sentence of section 3 reads: "The legislature shall, at its next session after this section shall become part of the constitution, provide by general law for carrying into effect the provisions of this section." Respondent claims that having enacted the City Home Rule Law, the Legislature could only change its provisions by other general laws, ignoring that section 2 of the same article gives the Legislature the right to pass any law relating to the property, affairs or government of a single city where it is done upon an emergency message from the Governor, with the concurrent action of two-thirds of the members of each House of the Legislature.

Section 20 of the City Home Rule Law, relating to new charters, has thus been changed by an emergency local law relating to the city of New York, transferring the power of revision from the legislative body to a revision commission. This is not unconstitutional.

The order should be reversed, and the motion denied, without costs.

REUTENER v. CITY OF CLEVELAND

Supreme Court of Ohio, 1923. 107 Ohio St. 117, 141 N.E. 27.

[Taxpayer's suit to restrain the City of Cleveland and its mayor from putting into effect a home rule charter amendment which would establish the Hare system of proportional representation for municipal elections in the city. The lower court upheld the amendment and rendered judgment for defendants.]

⁶ This was changed in 1938. Under N.Y.Const. Art. IX, § 11, as it now reads, the legislature may enact such a law only upon emergency request from the mayor of a city, concurred in by the city legislative body, or upon request of two-thirds of the elective membership of the city legislative body.

ALLEN, J. . . . Plaintiff in error claims that the proportional representation feature of the amendment contravenes section 1, article V, of the Constitution of Ohio. This section of the Constitution reads:

"Every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, and of the county, township, or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector, and be *entitled* to vote at all elections."

By the terms of the amendment here questioned the city of Cleveland is divided into 4 districts. The old wards are abolished, and the council is to consist of 25 members elected from the 4 districts, each of which is to choose not less than 5 nor more than 9 council members. The districts and the number of councilmen from each are designated, subject to future change by the council. Candidates for council are nominated by petition; no elector being permitted to sign the nominating petition of more than one candidate. The candidates' names are printed on the ballot, and the elector then votes by placing the figure '1' opposite the name of his first choice, the figure '2' opposite the name of his second choice, and so on down the list, putting consecutive numerals beside the name of as many candidates as he pleases. The ballot contains these words:

"The more choices you express, the surer you are to make your ballot count for one of the candidates you favor."

When the polls close the ballots are counted, all the first choice ballots for the respective candidates being put into separate packages. The whole number of valid ballots is then counted, and divided by a number greater by one than the whole number of seats to be filled in the district. The next whole number larger than the existing quotient is called the quota, and any candidate receiving first choice votes equaling or exceeding the quota is declared elected. If a candidate has more such votes than the quota, the surplus is taken at random from among his ballots, and distributed among candidates having fewer first choice votes than the quota, according to the expressed second choice. Likewise, on each count, the lowest candidate is declared defeated, and his ballots are distributed among the so-called continuing candidates.

Plaintiff in error claims that, under this system, an elector residing in a district represented by from 5 to 9 councilmen, no matter how many preferences he expresses when he casts his ballot, has his ballot counted for but one councilman; that he is permitted to vote for but one candidate. The court does not consider that this contention is established upon the facts. The

ballot is counted every time that it is considered as adding one to or subtracting one from a group of votes. It is true that the vote may become effective in electing only one candidate, and in this sense possibly it may be "counted for only one councilman."

However, plaintiff in error can hardly contend that a voting system which may at times deprive a ballot of its full effect is necessarily unconstitutional. That the effect of a vote is often nullified in our elections is axiomatic. It is a matter of common knowledge that national officials have been elected by an actual minority. John Quincy Adams, for instance, received fewer popular votes than Andrew Jackson in the election of 1824. The popular vote for Jackson was 155,872; for Adams 105,321. Cyclopedia of American Government, volume III, page 11. That is to say, votes of a plurality of electors are not always counted, so as to be effective in national elections. It is also a matter of common knowledge that, through the gerrymander, districts may be so defined as to be practically deprived of the effectiveness of their votes in elections: that is, a majority may be so districted as to become a minority, without power of electing its candidates.

The vote of an elector, therefore, under our present form of state and national government, may be shorn of its effect so far as the actual election of the elector's candidate is concerned, without invalidating the method of election. This fact certainly is established, however, that under the Hare system the voter is permitted to vote only one first choice vote, although at least five, and possibly nine, candidates are to be elected from his district.

The question, then narrows itself down to this: Does the fact that the elector under this system votes a first choice for one officer only, there being from 5 to 9 to be elected in the district, violate the provision of section 1, article V, of the Constitution, that every elector shall be entitled to vote at all elections? On the face meaning of this section the Hare system of proportional representation does not violate the Ohio Constitution, for the elector is not prevented from voting at any election. He is entitled to vote at every municipal election, even though his vote may be effective in the election of fewer than the full number of candidates, and he has exactly the same voting power and right as every other elector.

The plaintiff in error, however, claims that State ex rel. v. Constantine, 42 Ohio St. 437, 51 Am.Rep. 833, is an authority binding upon this court in his favor. The second and third propositions of the syllabus in the Constantine Case are:

"2. Where an office is filled by an election, the election must conform to the requirements of the Constitution, and each elector of the district is entitled to vote for a candidate for each office to be filled at the election.

"3. A statute authorizing the election of four members of the police board at the same election, but which denies to an elector the right to vote for more than two members, is in conflict with article V of the Constitution."

This case is certainly an authority against the position of the defendant in error. The slight circumstance that limited voting was condemned in the Constantine Case, while it is proportional representation that is here attacked, does not greatly differentiate the cases. State ex rel. v. Constantine, however, extended the plain language of the Constitution far beyond the word meaning of the provision in section 1, article V. To the clause, shall "be entitled to vote at all elections," the Constantine Case added the clause, and "for a candidate for each office to be filled at an election." Moreover, that case was decided before the home rule provision of the Ohio Constitution was enacted. Since then a whole new body of law has developed in regard to Ohio city government—a body of law giving to cities the widest possible latitude in the formation of their local governments and in the performance of local governmental functions, limited only by provigions of the state Constitution.

In 1912 the people of Ohio gave to municipalities all powers of local self-government. Sections 3 and 7, article XVIII, Ohio Constitution. Under these provisions this court has held that a system of preferential voting in a chartered municipality is valid (Fitzgerald v. Cleveland, 88 Ohio St. 338, 103 N.E. 512, Ann. Cas.1915B, 106); that the provisions as to civil service in the charter of a city, if they comply with the state Constitution, discontinue the general law on the subject as to that municipality (State ex rel. v. Lentz et al., Civil Service Commission, v. Edwards, 90 Ohio St. 305, 107 N.E. 768); and that women can by home rule charter be made voters in local affairs, contrary to the provision of section 1, article V (State ex rel. Taylor v. French, 96 Ohio St. 172, 117 N.E. 173, Ann.Cas.1918C, 896). To hold valid this system of voting adopted by the people of Cleveland is merely to carry out the plain meaning of the constitutional provision that municipalities shall have all powers of local self-government, and to give effect to the power which rightly takes precedence over all statutes and court decisions, the will of the people, as expressed in the organic law.

Electoral provisions similar to these have lately been upheld in other states. In the case of Commonwealth ex rel. McCormick Atty. Gen., v. Reeder, 171 Pa. 505, 33 A. 67, 33 L.R.A. 141, the Supreme Court of Pennsylvania held constitutional an act providing for the election of a given number of judges, notwithstanding

the fact that an elector was not allowed to vote for as many persons as there were places to be filled. See, also, State v. Monahan, 72 Kan. 492, 84 P. 130, 115 Am.St.Rep. 224, 7 Ann.Cas. 661, wherein the Supreme Court of Kansas upheld a legislative act which provided a property qualification for electors desiring to vote for directors of a drainage district, notwithstanding a constitutional provision against such qualifications so far as electors generally were concerned.

Counsel for plaintiff in error cite to the court the case of Wattles ex rel. Johnson v. Upjohn, 211 Mich. 514, 179 N.W. 335, a recent case, which held that under the home rule act of Michigan the provisions of the Kalamazoo charter, providing substantially for the use of the Hare system of proportional representation, violated the Michigan Constitution. The plaintiff in that action, which was a *quo warranto* proceeding, attacked the proportional representation feature of the charter upon the specific ground that the elector, under the Hare voting system, would be deprived of his right to vote for every office to be filled.

The provisions of the Constitution of Michigan applicable to the question of voting are as follows:

"In all elections, every male inhabitant [defining the qualifications of voters] shall be an elector or entitled to vote." Article 3, § 1.

Also:

"No city or village shall have power to abridge the right of elective franchise." Article 8, § 25.

It is conceded that, if the Constitution of Ohio were the same as that of Michigan, this Upjohn Case would be a direct authority against the validity of the proportional representation feature of the Cleveland amendment. But the Constitutions of Ohio and Michigan upon this point are very different. The Ohio document contains a home rule provision which grants cities all powers—that is, unlimited power—of local self-government. The Michigan Constitution contains no such broad provision. Its so-called home rule section is as follows:

"Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter and to amend an existing charter of the city or village heretofore granted or passed by the Legislature for the government of the city or village and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the Constitution and general laws of this state." Section 21, article VIII.

This fact, then, distinguishes the two cases. In Ohio, charter cities have all powers of local self-government; and in Michigan,

their powers of local self-government are limited. The Upjohn Case, therefore, is not an authority against this holding.

Upon the same ground we also distinguished In re Opinion of Judges, 21 R.I. 579, 41 A. 1009. That case arose under a section of the Rhode Island Constitution which specifically provides that "each elector shall be entitled to vote in the election of all civil officers," a wording which necessarily compelled the opinion rendered. Furthermore, the Rhode Island case did not arise under an unlimited grant of power of local self-government. The same distinction also applies in every case cited by counsel for plaintiff in error as supporting his contention.

Since it is the opinion of a majority of the court that the Hare system of proportional representation outlined in the amendment is valid under the unlimited powers of local self-government given to charter cities in the Ohio Constitution, it is unnecessary in the instant case to decide whether that feature of the amendment is separable from the sections embodying the rest of the proposal. After all, is not the purpose of the home rule amendment to the Constitution exactly this: That progress in municipalities shall not be hampered by uniformity of action: that communities acting in local self-government may work out their own political destiny, and their own political freedom, on their own initiative, and in their own way; and, with this purpose in mind, should not the enactment of political alterations in the structure and substance of a charter government be given every possible presumption of validity? There is a presumption that the enacted statute is valid. County of Miami v. City of Dayton, 92 Ohio St. 215, 110 N.E. 726. Not less should there be a presumption that changes enacted according to law in the organic Constitution of a home rule city are valid.

For these and the reasons heretofore given the judgment is affirmed.

Judgment affirmed.

MARSHALL, C. J., and WANAMAKER, MATTHIAS, and DAY, JJ., concur.

Jones, J., (concurring). Section 1, article V, of the Constitution, explicitly pertains to and controls the *qualifications of electors at all elections;* but it does not attempt to control the *mode* of elections, nor the personnel of municipal officials. These are features of "local self-government" committed to chartered municipalities. As to other municipalities, State ex rel. v. Constantine, 42 Ohio St. 437, 51 Am.Rep. 833, has not been overruled and its principles still apply.

ROBINSON, J. (dissenting). The pronouncement of the majority of the court in this case does not change the interpretation of section 1, article V, of the Ohio Constitution, enunciated in State ex rel. v. Constantine, 42 Ohio St. 437, 51 Am.Rep. 833, that "each elector of the district is entitled to vote for a candidate for each office to be filled at the election," but declares that section inapplicable to chartered cities by reason of the provision of section 3, article XVIII, of the Constitution, that:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

Since it cannot be denied that these two sections may be construed together, so as to give force and effect to each, the effect of the decision is to declare section 3, article XVIII, paramount to section 1, article V. If paramount to section 1, article V, the same process of reasoning would make it paramount to all other provisions of the Ohio Constitution. The pronouncement carried to its logical conclusion is: The inhabitants of a chartered city, as between such inhabitants and the local government, have no constitutional rights. I do not believe that the electors of the whole state have the power to vote the constitutional guaranties away from the people of a portion of the state, nor do I believe they have consciously undertaken to do so.

In my opinion, if the sustaining of the charter of the city of Cleveland requires the surrendering by its inhabitants, as between them and the local government, of all their constitutional rights, it is sustained at too great a cost to them. Therefore I dissent from the reasoning, the pronouncement of law, and the judgment.⁷

STATE ex rel. AREY v. SHERRILL

Supreme Court of Ohio, 1944. 142 Ohio St. 574, 53 N.E.2d 501.

Russell H. Arey (hereinafter called relator) filed a petition in this court against Clarence O. Sherrill (hereinafter called respondent) as city manager of the city of Cincinnati. The relief sought is the issuance of a writ of prohibition to restrain respondent from proceeding with a hearing set for July 30, 1943, of charges filed against relator. An alternative writ was granted.

⁷ The proportional representation provisions of the home rule charter of the City of New York were upheld in Johnson v. City of New York, 274 N.Y. 411, 9 N.E.2d 30, 110 A.L.R. 1502 (1937). In 1947, however, the voters put an end to them. PR survived an attack at the polls in Cincinnati that year.

the respondent answered and relator filed a reply to the answer. . . .

Bell, Judge. In the instant case neither party has filed any motion or demurrer and there is no agreed statement of facts or evidence, therefore the cause will be disposed of as if there had been filed a motion for judgment on the pleadings.

The sole question presented is whether the respondent has the authority to hear and determine the charges filed against the relator.

Counsel for relator vehemently assert that respondent is without authority in law to hear and determine the charges. On the other hand counsel for respondent assert with equal vigor that the city charter and administrative code grant respondent full and complete authority to hear and determine such charges.

The answer to the question presented must come from a consideration and construction of certain provisions of the Constitution, General Code, city charter and administrative code adopted in pursuance of the charter.

Before proceeding to the controlling question it should be noted that Section 2, Article XVIII of the Constitution, provides ". . . and additional laws may also be passed for the government of municipalities adopting the same; . . ." The General Assembly, by authority of that section, passed laws providing three plans of municipal government known as the "commission plan" (Sections 3515–11 to 3515–18, both inclusive, General Code), the "city manager plan" (Sections 3515–19 to 3515–28, both inclusive, General Code), and the "federal plan" (Sections 3515–29 to 3515–44, both inclusive, General Code).

The city of Cincinnati did not organize under or adopt any of the statutory plans but adopted its charter under the general grant of power contained in Section 7, Article XVIII of the Constitution, which reads as follows:

"Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

Section 3, Article XVIII, provides:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

These two provisions of the Constitution were adopted at the same time, are in pari materia and must be construed together. See Fitzgerald et al., Bd. of Supervisors, v. City of Cleveland, 88 Ohio St. 338, 103 N.E. 512, Ann.Cas.1915B, 106.

Section 3, Article XVIII, grants to all municipalities authority to exercise all powers of *local* self-government, subject to the limitation that police, sanitary and other similar regulations adopted by a municipality *shall not conflict with general laws*. The word *local* as used in that provision of the Constitution has a definite meaning. The phrase "all powers of *local* self-government" as used therein, means the power of self-government in all matters of a purely local nature.

It seems evident that the framers of that provision had in mind that police, sanitary and other similar regulations were not purely local matters and therefore should continue to be controlled by general law. Hence the limitation upon the power.

The debates in the Constitutional Convention of 1912 upon the subject of the home-rule amendment (now Article XVIII of the Constitution) were both lengthy and heated. Sections 3 and 7 of that amendment proposed for adoption by the convention caused debate which at times became bitter and personal. Vol. 2, Proceedings and Debates of the Constitutional Convention of Ohio of 1912, 1439 et seq.

On the one side were those who desired to grant to municipalities unlimited power of self-government and on the other were those who favored only limited power. A comparison of the language of Sections 3 and 7 as originally proposed for adoption (by the convention) with the language of those sections as adopted (by the convention) furnishes conclusive evidence that the Constitutional Convention did not intend to adopt and recommend for passage constitutional provisions granting unlimited power of self-government.

By the adoption of Article XVIII the people granted to the municipalities of the state unlimited power of self-government in all matters purely local in their aspect but limited their power in all matters of general concern to the whole people of the state.

It would be a bold man who would assert that the police power of the state does not include the establishment of and general control over police departments and the members thereof.

Under the provisions of Section 3, Article XVIII, all municipalities are granted "all powers of local self-government" and such powers are in no wise dependent upon the adoption of a charter.

The language of Section 7, Article XVIII, is permissive and grants authority to any municipality to adopt a charter.

It therefore follows that a municipality in adopting a charter as authorized by Section 7 is merely exercising a permissive authority of local self-government conferred upon all municipalities by Section 3; but it does not follow that after the

adoption of a charter a municipality thereby has greater powers of local self-government than those which may be exercised by any municipality which has not adopted a charter.

As we view these provisions, a municipality by adopting a charter form of government does not become an independent sovereignty. See Cleveland Tel. Co. v. City of Cleveland, 98 Ohio St. 358, 121 N.E. 701.

A municipality may adopt a charter which prescribes its form of government and defines its powers on purely local matters. The state, however, remains supreme in all matters not purely local. Billings v. Cleveland R. Co., 92 Ohio St. 478, 111 N.E. 155; State ex rel. Giovanello v. Village of Lowellville, 139 Ohio St. 219, 39 N.E.2d 527; State ex rel. Daly v. City of Toledo, 142 Ohio St. 123, 50 N.E.2d 338.

At the threshold of our consideration of the ultimate question we must first determine whether this is a matter of purely local concern.

As has been observed, charges have been preferred against a police officer of the city; relator claims such charges must be determined by the Director of Public Safety under the provisions of the General Code; and the respondent claims the right and authority to hear and determine those charges under the provisions of the city charter and the administrative code. The General Assembly has provided for the organization of police departments, the protection of the tenure of members thereof, the causes for suspension or discharge and the methods of procedure to effect suspension or discharge.

The police department of a city is charged with the duty of protecting the lives and property of all persons therein, irrespective of their place of residence, and with enforcing all state laws as well as city ordinances.

Those duties have a definite relation to the public safety and general welfare of society as a whole and are a matter of statewide concern.

In the case of City of Cincinnati v. Gamble et al., Bd of Trustees, 138 Ohio St. 220, 34 N.E.2d 226, 227, paragraphs three and four of the syllabus read as follows:

- "3. In matters of state-wide concern the state is supreme over its municipalities and may in the exercise of its sovereignty impose duties and responsibilities upon them as arms or agencies of the state.
- "4. In general, matters relating to police and fire protection are of state-wide concern and are under the control of state sovereignty."

It is established by a uniform line of decisions of this court that matters pertaining to a police department are of statewide concern and that municipalities, charter or otherwise, are without authority to adopt regulations in respect thereto which are in conflict with general law.

The term "general laws" as used in Section 3, Article XVIII, has been construed to mean state statutes. Village of Brewster v. Hill, 128 Ohio St. 354, 191 N.E. 366; City of Cincinnati v. Correll, 141 Ohio St. 535, 49 N.E.2d 412.

The General Assembly has provided that all members of the police department in every city shall be maintained under civil service. Section 4378, General Code.

That the police department of a city is a matter of state-wide concern does not prevent the city from adopting any regulation in reference thereto so long as such regulation does not conflict with general laws.

The power and authority of respondent to hear and determine the charges must depend, first upon the provisions of the city charter and the administrative code of the city, second, upon any pertinent provisions of the General Code, and, third, upon whether there is a conflict between the provisions of the charter and the administrative code and the provisions of the General Code.

The city charter, as amended in 1926, and as still in effect, provides as follows (Section 7, Article II):

"The existing departments, divisions and boards of the city government are continued unless changed by the provisions of this charter or by ordinance of the council. Within six months after the adoption of this charter, the council shall by ordinance adopt an administrative code providing for a complete plan of administrative organization of the city government. Thereafter, except as established by the provisions of this charter, the council may change, abolish, combine and rearrange the departments, divisions and boards of the city government provided for in said administrative code, but an ordinance creating, combining, abolishing or decreasing the powers of any department, division or board, shall require a vote of three-fourths of the members elected to the council, except the ordinance adopting an administrative code."

Pursuant to that authority the city council adopted an administrative code which, as now in effect, provides for four departments under the city manager known as departments of law, safety, public works and public utilities.

Section 1 of Article II of the administrative code provides:

"The city manager, except as otherwise provided in the charter, shall appoint and may dismiss, suspend, and discipline all officers and employees in the administrative service under his control."

It is claimed by virtue of these provisions of the charter and the administrative code the respondent is granted power and authority to hear and determine the charges against relator.

This claim must be sustained unless applying those provisions of the city charter and the administrative code to cases involving members of the police department creates conflict with general laws.

Section 4367, General Code, reads as follows:

"In each city there shall be a department of public safety, which shall be administered by a director of public safety. . . ." (Italics ours.)

This provision of the Code is mandatory and under its provisions every city except those organized under authority of Section 3515-1 et seq., General Code, must have a department of public safety administered by a director of public safety.

Section 4368, General Code, provides in part:

". . . He [the director of public safety] shall have all powers and duties connected with and incident to the appointment, regulation and government of these departments [police and fire departments] except as otherwise provided by law.

Section 4378, General Code, provides in part as follows:

". . . The police and fire departments in every city shall be maintained under the civil service system, as provided in this subdivision."

By the provisions of Section 4379, General Code, the chief of police has the exclusive right to suspend any member of the department for incompetence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by the proper authority, or for any other reasonable or just cause.

Section 4380, General Code, reads as follows:

"If any such employe is suspended as herein provided, the chief of police . . . forthwith in writing, shall certify such fact, together with the cause for such suspension to the director of public safety, who within five days from the receipt thereof, shall proceed to inquire into the cause of such suspension and render judgment thereon, which judgment, if the charge be sustained, may be either suspension, reduction in rank or dismissal from the department, and such judgment in the matter shall

be final except as otherwise provided in this subdivision. Said director, in any investigation of charges against a member of the police or fire department shall have the same powers to administer oaths and to secure the attendance of witnesses and the production of books and papers as are conferred by this subdivision upon the mayor."

By the provisions of these quoted sections the director of safety is granted the power of appointment of police officers, their supervision, the power to hear and determine charges made against them and to inflict such punishment as is justified under the facts in each particular case.

We are of opinion that insofar as the city charter and the administrative code attempt to grant authority to the city manager to inquire into the cause of suspension of a member of the police department of the city and to render judgment thereon such provisions are in conflict with and must yield to the provisions of the General Code.

It is further claimed that by reason of the provisions of Section 486-17a, General Code, the city manager is granted power to inquire into the cause of suspension and render judgment thereon. This claim is based upon the contention that the city manager is the appointing officer.

We have already called attention to the provisions of Section 4368, General Code, which grant to the director of public safety all power connected with and incident to the appointment of members of the police department. We find no merit in the contention of respondent upon this phase of the controversy.

Finally respondent contends that prohibition is not the appropriate remedy.

The writ of prohibition has been defined by this court in the case of State ex rel. Brickell v. Roach, Recr., 122 Ohio St. 117, 170 N.E. 866. Paragraph one of the syllabus reads as follows:

"A writ of prohibition is an extraordinary judicial writ, issuing out of a court of superior jurisdiction, to prevent an inferior court or tribunal from usurping jurisdiction with which it is not legally invested."

The functions here sought to be exercised are of a quasi-judicial nature and this court has on numerous occasions granted a writ of prohibition to keep administrative tribunals within the limits of their jurisdiction. State ex rel. Nolan v. ClenDening, 93 Ohio St. 264, 112 N.E. 1029; State ex rel. McCrehen v. Brown, Secy. of State, 108 Ohio St. 454, 141 N.E. 69; State ex rel. Schorr v. Viner et al., Civil Service Comm., 119 Ohio St. 303, 164 N.E. 119; State ex rel. Stanley v. Bernon et al., Bd of Elec-

tions, 127 Ohio St. 204, 187 N.E. 733; and State ex rel. Pawlowicz v. Edy, City Mgr., 134 Ohio St. 389, 17 N.E.2d 638.

We conclude that the city manager has no authority or jurisdiction to proceed to inquire into the cause of the suspension of relator or to render judgment thereon; that relator has no adequate remedy at law and, the answer admitting that respondent will proceed to exercise that jurisdiction unless prohibited from so doing by this court, it follows that the writ should be and hereby is allowed.

Writ allowed.8

In Ohio the home rule amendment was originally interpreted to mean that the adjective process of charter-making must be put into play to render substantive home rule powers available. State ex rel. Toledo v. Lynch, 88 Ohio St. 71, 102 N.E. 670 (1913). This decision was overruled in 1923. The Village of Perrysburg v. Ridgeway, 108 Ohio St. 245, 140 N.E. 595 (1923).

The Sherrill case re-iterated the then well-established interpretation that substantive home rule powers are granted directly by the constitution to all municipalities, charter and non-charter. Does this make a charter an instrument of limitation? See Comment 9 Ohio St.L.J. 121 (1948). In most of the home rule states it is necessary to adopt a charter before substantive home rule powers may be enjoyed. The charter is by way of grant, not of limitation. Concerning the California theory see West Coast Advertising Co. v. City and County of San Francisco, 14 Cal.2d 516, 95 P.2d 148 (1939). In some states home rule powers may be exercised by amending existing special charters. Frankenstein v. Rushmore & Gowdy, 217 S.W. 189 (Tex. Civ.App.1920); State ex rel. Tucker v. City of Wheeling, 128 W.Va. 47, 35 S.E.2d 681, 685 (1945); Wisconsin Stats. § 66.01 (1937).

WINTERS v. BISAILLON

Supreme Court of Oregon, 1936. 152 Or. 578, 54 P.2d 1169.

Bailey, Justice. This is an action for damages for personal injuries sustained by plaintiff in a collision between motor vehicles in the city of Portland. . . .

The case was tried before the court and a jury, and, from a judgment entered on a verdict in favor of the defendant, the plaintiff appeals. . . .

⁸ The concurring opinion of Judge Williams is omitted. Judge Turner dissented.

The two remaining assignments of error involve the question of whether the city ordinance limiting the speed of motor vehicles within the corporate limits of the city of Portland to 25 miles an hour is in conflict with the laws of this state regulating the speed of motor vehicles, and, if so, whether the state law or the city ordinance is controlling.

One of the acts of negligence with which the plaintiff charges the defendant is that the latter was driving at a greater rate of speed than 25 miles an hour. Ordinance No. 61219 of the city of Portland, passed August 12, 1931, provides that it shall be unlawful to operate a motor vehicle within the corporate limits of the city of Portland at a greater speed than 25 miles per hour. The circuit court refused to give certain instructions in this connection requested by the plaintiff, and ruled that the ordinance, in so far as it attempted to prescribe a maximum rate of speed, was contrary to the state law; hence to that extent invalid.

Our first inquiry will therefore be directed to the question of whether the city ordinance is in conflict with the state law, for, if it is not, then we need not consider which is applicable here, the statute or the provisions of the city ordinance.

Chapter 360, Oregon Laws 1931 (page 626), is the only state law with which we are now concerned. Section 20, subdivision (a), page 637, of this act, is referred to as the basic rule, and provides that "no person shall drive a vehicle upon a highway at a speed greater than is reasonable and prudent, having due regard to the traffic, surface and width of the highway and the hazards at intersections and any other conditions then existing." Subdivision (b) of the same section specifies the indicated speeds in passing schoolhouses, in approaching grade crossings of steam. electric, or street railways, driving in business districts, in residence districts, in public parks within city limits, and outside business and residence districts. It further provides a penalty upon conviction of violating the basic rule, and the penalty in case of violation of the basic rule coupled with infringement of the indicated speed limit is more severe than for violation of the basic rule only. No punishment is provided for exceeding the indicated speed limit unless some other provision of the act is also violated.

Sections 6 and 7 (page 631), so far as the latter is applicable, of the act above referred to, are as follows:

"Section 6. The provisions of this act shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein and no local authority shall enact or enforce any rule or regulation in conflict with the provisions of this act unless expressly authorized herein.

"Section 7. (a) Local authorities, except as specifically authorized in this act, shall have no power or authority to alter any of the regulations declared in this act, or to enact or enforce any rule or regulation contrary to the provisions of this act, except that local authorities shall have power to provide by ordinance for the regulation of traffic by means of traffic officers or semaphores or other signal devices on any portion of the highway where traffic is heavy or continuous, and may prohibit other than one-way traffic upon certain highways, and may regulate the use of the highways by processions or assemblages; provided, however, that where one-way traffic is provided for, such authorities shall erect and maintain suitable signs at reasonable intervals upon said highway informing the public of such fact."

Section 21 of the act (page 639) is as follows: "Local authorities in their respective jurisdictions are hereby authorized in their discretion to indicate by ordinance higher speeds than those indicated in subdivision (b) of section 20 upon through highways or upon highways or portions thereof where there are no intersections or between widely spaced intersections . . . giving notice of the indicated speed, but local authorities shall not have authority to modify or alter the basic rule set forth in subdivision (a) of section 20, or in any event to indicate by ordinance a speed in excess of 45 miles per hour."

Chapter 360, supra, also confers upon cities power to enact ordinances relating to the regulation in certain respects of traffic within their corporate limits, by placing "markers, buttons or signs within intersections," or specifying that the course of vehicles turning left be other than that provided in the act, section 32 (d), page 644; or by placing appropriate signs, markings and traffic control signals, section 10, subd. (a), page 632. But nowhere in the act are local authorities given any power to regulate the speed of automobiles otherwise than as hereinabove mentioned.

In Schneiderman v. Sesanstein, 121 Ohio St. 80, 167 N.E. 158, 160, 64 A.L.R. 981, in discussing the question of whether a city ordinance providing a speed limit of 15 miles an hour was in conflict with the state law, the court said:

"When the law of the state provides that a rate of speed greater than a rate therein specified shall be unlawful, it is equivalent to stating that driving at a less rate of speed shall not be a violation of law; and therefore an ordinance of a municipality which attempts to make unlawful a rate of speed which the state by general law has stamped as lawful would be in conflict therewith. . . .

"The standard of conduct prescribed by statute is that the speed shall not be greater than reasonable and proper, considering the conditions and circumstances there enumerated, and that is the test that must be applied under the statute. The conditions of traffic may be such as to require a much less speed than 15 miles an hour to meet the requirement that the speed shall not be greater than is reasonable and proper. On the other hand, a given speed may be well within the requirement of statute, though somewhat in excess of the rate arbitrarily fixed by ordinance."

See, also, in this connection, Hoigard v. Yellow Cab Company, 320 Ill. 317, 150 N.E. 911; Mendel v. Dorman, 202 Ky. 29, 258 S.W. 936; Eshner v. Lakewood, 121 Ohio St. 106, 166 N.E. 904, and Ex parte Daniels, 183 Cal. 636, 192 P. 442, 444, 21 A.L.R. 1172, including annotation.

We conclude that the part of the city ordinance above referred to restricting the speed of motor vehicles within the corporate limits of the city of Portland to 25 miles per hour does conflict with both the letter and the spirit of chapter 360, Oregon Laws 1931. An effort has been made throughout the country to enact, as far as possible, uniform laws relating to the use of highways by motor vehicles, in the various states of the Union. This purpose is emphasized by the wording of section 91 of the act (page 674), thus: "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it." Of even greater importance is the necessity, or at least the advisability, of having uniform laws regulating motor traffic within the borders of each state. Such laws are desirable in view of the great percentage of the public that travels by motor vehicle. If it were possible to fix a maximum rate of speed of 25 miles per hour in the city of Portland, there would be nothing to prevent fixing a much less or greater rate of speed in any other municipality of the state; and such speed limit in that event might depend only upon the whim or caprice of the local authorities without regard to reasonableness. Were the rate of speed definitely fixed, it would tend to minimize the importance of the basic rule, and might, as stated in Schneiderman v. Sesanstein, supra, be considered as the lawful rate of speed.

We shall now take up the question of whether, in the regulation of motor traffic within the limits of incorporated cities, state laws or city ordinances are controlling.

In Kalich v. Knapp, 73 Or. 558, 142 P. 594, 145 P. 22, Ann. Cas.1916E, 1051, this court held that the motor vehicle law of 1911 was unconstitutional in so far as it attempted to regulate speed of automobiles in the city of Portland. The decision in

that case was based on article 11, § 2, of the Constitution, commonly referred to as the home rule amendment, prohibiting the Legislative Assembly from enacting, amending, or repealing "any charter or act of incorporation for any municipality, city or town," which provision further specified that "the legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the constitution and criminal laws of the state of Oregon." The opinion in that case was followed by the court in Everart v. Fischer, 75 Or. 316, 145 P. 33, 147 P. 189.

There was a departure from the decision in the two foregoing cases, in Rose v. Port of Portland, 82 Or. 541, 162 P. 498, and Lovejoy v. Portland, 95 Or. 459, 188 P. 207, which cases, although not involving regulation of automobile speed, appear to have changed the law as enunciated in the preceding instances and to have upheld the power of the Legislature to enact general laws affecting municipalities. In the very recent case of Burton v. Gibbons, 148 Or. 370, 36 P.2d 786, 789, many authorities on the subject were cited and reviewed, and it was held that a general law applicable throughout the state was paramount and controlling over all charters and ordinances in conflict with it. In the opinion therein the court quoted with approval from Rose v. Port of Portland, supra, as follows: "The Legislature has the right to pass a general law concerning municipalities, cities, and towns; the right is contained in the Constitution, and therefore, when the legal voters of a city or town enact or amend a charter, they do so subject to the right of the Legislature to pass a general law because their right to enact or amend their charter must be exercised 'subject to the Constitution."

In Burton v. Gibbons, supra, this court continued: "Since that decision, all later cases have approved that ruling and it is now settled that, within the limits prescribed by the other provisions of the state Constitution and of the Federal Constitution, the power of the Legislature to enact a general law applicable alike to all cities is paramount and supreme over any conflicting charter provision or ordinance of any municipality, city, or town."

In Ex parte Daniels, supra, it is said: "The streets of a city belong to the people of the state, and every citizen of the state has a right to the use thereof, subject to legislative control. [Citing authorities.] The right of control over street traffic is an exercise of a part of the sovereign power of the state. Elliott on Roads and Streets, sections cited supra. While it is true that the regulation of traffic upon a public street is of special interest to the people of a municipality, it does not follow that such regulation is a municipal affair, and if there is a doubt as

to whether or not such regulation is a municipal affair, that doubt must be resolved in favor of the legislative authority of the state."

The regulation of automobile traffic on the streets of the city of Portland, which are used by all the people of Oregon, is of as much general concern to the state at large as is the refunding of bonds of a municipality in this state, which was the question involved in Burton v. Gibbons, supra, wherein it was held that the general law of the state superseded any charter provision on the same subject.

We conclude that Kalich v. Knapp, supra, Everart v. Fischer, supra, and any other pronouncement of this court to like effect, in so far as they hold that by the Constitution cities are granted exclusive or paramount authority to regulate motor vehicle traffic within their corporate limits, have been overruled by subsequent decisions of this court, and in the future should not be considered as the law of this state. We further hold that the state has and retains, either by act of the Legislature or by vote of the electorate, the right to enact general laws prescribing the speed of motor vehicles and general rules regulating traffic on the highways of the state, which right, when exercised, cannot be curtailed, infringed upon, or annulled by local authorities.

We concur in the view of the circuit court that the ordinance here involved, in so far as it attempts to prescribe a speed limit for motor vehicles in the city of Portland, is invalid. The judgment is affirmed.⁹

How are we to classify slum clearance and urban rehabilitation? Nearly twenty years ago the New York Court of Appeals upheld the Multiple Dwelling Law, which was addressed to slum conditions affecting safety and health and which actually applied only to the City of New York. Adler v. Deegan, 251 N.Y. 467, 167 N.E. 705 (1929). Public housing provided by municipal housing authorities to effect slum clearance has been declared a matter of state concern. Humphrey v. City of Phoenix, 55 Ariz. 374, 102 P.2d 82 (1940). The Adler case is discussed by Joseph L. Weiner, "Municipal Home Rule in New York" 37 Col.L.Rev. 557, 565 (1937).

To what extent is local finance a matter of local concern in the home rule sense? One aspect of this question was presented in City of Portland v. Welch, 154 Or. 286, 59 P.2d 228 (1936). Portland attacked the validity of a statute which gave a state

⁹ See J. P. Ronchetto and Wayne Woodmansee, "Home Rule in Oregon" 18 Ore.L.Rev. 216, 218, 223 (1939).

commission authority to review the city budget and, after hearing, to "approve, reject, or reduce the same or any items therein". One ground for invalidating the act was that it invaded the city's home rule powers insofar as it purported to authorize the commission to modify a city budget which did not go beyond constitutional or statutory debt or tax limitations. The opinion of the court reads in part (59 P.2d 233):

"In our opinion, local taxation and indebtedness under certain circumstances may become a matter of concern to the state. Indeed, the Constitution itself imposes a tax limitation upon municipalities and taxing districts (article 11, section 11, Constitution of Oregon). See Burton v. Gibbons, supra. 10 Hence, the Legislature may, by a general law, limit the levying of taxes or incurrence of indebtedness by municipalities. McQuillin, Municipal Corporations (2d Ed.) section 2366. The Legislature, however, has not seen fit to fix a limitation upon the amount of taxes a city may levy. We take it, therefore, that a tax levy by a municipality, germane to the purposes for which it was incorporated, not in excess of a limitation fixed by the Constitution or by a general law, is a matter of local concern. A general legislative enactment limiting the indebtedness or the tax levy of a subordinate governmental agency is a far cry from one which purports to authorize an appointive commission to 'approve, reject, or reduce the budget or any items therein,' even though the city has not exceeded any limitation fixed by the Constitution or statute. If a city has not violated any constitutional or statutory limitation of indebtedness or taxation, of what concern is it to the people of the state at large whether it levies a tax to pay its city officials, repair fire hose, build a swimming pool, buy stamps, or improve a public park? Are these not matters of purely local concern? If such items of expenditure can be eliminated or reduced, in accordance with the judgment of members of a nonelective commission, then the right of local self-government under the Home Rule Amendments of the Constitution has become a hollow mockery. officials elected by the people to determine such matters of governmental policy would, under such an act, become nonentities."

Without financial independence it is a question whether highsounding grants of home rule powers are very meaningful. Yet, it is in this very area that home rule municipalities enjoy least advantage. They are usually subject to constitutional or statutory property tax and debt limits. The property tax is still, with some exceptions, their chief source of revenue. Generally

^{10 148} Or. 370, 36 P.2d 786 (1934).

speaking, moreover, it cannot be said that there is wide municipal freedom in imposing excises.

In California, where municipal home rule is granted directly by the constitution, the power of a city to levy a license tax to meet city revenue needs has been judicially confirmed as a strictly municipal affair. West Coast Advertising Co. v. City and County of San Francisco, 14 Cal.2d 516, 95 P.2d 138 (1939). This has interesting implications. In the absence of constitutional limitations, it would, in principle, leave the city free to levy any kind of tax it pleased without regard to the state revenue system, whether in matters of substantive taxation or tax administration and procedure.

The Ohio situation affords an interesting contrast. In that state, it will be recalled, substantive home rule powers are granted directly by the constitution to all municipalities, independently of charter-making. The grant of all powers of local self-government is interpreted to include "the power of taxation." Zielonka v. Carrel, 99 Ohio St. 220, 124 N.E. 134 (1919). The Home Rule Amendment, however, contains a provision (Article XVIII, § 13), which reads as follows:

Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities.

Under this section it has been decided not only that the General Assembly may impose express limitations upon municipal excises as well as ad valorem levies but also that limitations upon a municipal excise may arise by implications from state legislation which levies the same or a similar excise tax and, thus, "pre-empts the field." Haefner v. City of Youngstown, 147 Ohio St. 58, 68 N.E.2d 64 (1946). C. Emory Glander and Addison E. Dewey, "Municipal Taxation—A Study of the Pre-emption Doctrine" 9 Ohio St.L.J. 72 (1948).

Does state interest in local borrowing go no further than the establishment of debt limits? What of the power to issue the various types of securities known to local finance and the provision of remedial sanctions to render them attractive to investors? Does the state have no general interest in the procedure for the authorization and issuance of local securities? Obviously, it does. There can be much genuine local discretion without the courts embracing the notion that both local borrowing power and procedure are strictly local business. The Ohio constitutional provision quoted above empowers the legislature to lim-

it municipal power to incur debts. Actually, the legislature carefully regulates the procedure of municipal borrowing in addition to limiting the power to incur debt by borrowing money. Ohio General Code, § 2293-1 et seq. (Page, 1939).

In California, the second home rule state (1879), there was included in the original home rule article of the constitution (Article XI) a Section 11, which survives unchanged and reads as follows: "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." The late Professor Peppin's well-documented discussion of that section tells us that the "origin and purposes of the provision are exceedingly obscure." John C. Peppin, "Municipal Home Rule in California III: Section 11 of Article XI of the California Constitution" 32 Calif.L.Rev. 341 (1944). Mr. Peppin noted the adoption of a similar provision in Washington (Art. X, § 11, 1889); Idaho (Art. XII, § 2, 1889); and Ohio (Art. XVIII, § 3, 1912). Idaho is not a home rule state. The Ohio grant is confined to municipalities. Utah has a similar provision (Art. XI, § 5), but its grant extends only to charter cities, whereas the Ohio constitution devolves the authority directly upon all municipalities. The Model State Constitution of the National Municipal League sets out, in Section 824 (a), a modification of the Ohio provision, which would confer upon cities power "to adopt and enforce within their limits local police, sanitary and other similar regulations, not in conflict with general laws uniformly applicable to all cities."

PIPOLY v. BENSON

Supreme Court of California, 1942. 20 Cal.2d 366, 125 P.2d 482.

GIBSON, CHIEF JUSTICE. Plaintiffs, the widow and son of Eugene Pipoly, deceased, brought this action to recover damages for his wrongful death. The deceased was struck after dark by an automobile operated by the defendant Frank Benson while Pipoly was crossing Central avenue near the intersection of East Seventy-eighth street in Los Angeles. At the time of the accident Benson was driving an automobile owned by his wife and co-defendant, Myrtle Benson, and was acting within the scope of his employment as her employee. Pipoly died as a result of his injuries and plaintiffs brought this action alleging that his death was caused by the negligence of defendant Frank Benson. Defendants denied the material allegations of the complaint and alleged as affirmative defenses that the death of deceased was caused by his own contributory negligence or by unavoidable

accident. The jury found for defendants and a judgment was given in their favor. . . .

The main ground which plaintiffs urge upon this appeal is that the instructions of the trial court respecting deceased's statutory obligations as a pedestrian were so conflicting as to constitute prejudicial error. The jury was instructed that under the Vehicle Code it is the duty of a pedestrian to yield the right of way to all vehicles on the roadway if crossing at any point other than within a marked crosswalk. This instruction sets forth the provisions of section 562 (a) of the Vehicle Code, St. 1935, p. 188: "Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway." The court, however, also instructed the jury in the language of the Municipal Code of Los Angeles, section 80.38: "No pedestrian shall cross a roadway other than by a crosswalk in a central traffic district or in any business district." The jury was told that if they found that deceased violated the ordinance he was presumptively guilty of negligence since it was stipulated that the accident occurred within a business district as defined by the ordinance. Plaintiffs argue that the ordinance is unconstitutional. It is said to conflict with the provisions of the Vehicle Code because it prohibits a pedestrian from crossing a roadway outside a crosswalk while the statute merely imposes upon the pedestrian an obligation to yield the right of way if he crosses outside the crosswalk. Since the trial court based its instructions to the jury upon the ordinance and also the statute, plaintiffs contend that the conflicting instructions require a reversal of the judgment for defendants.

The decisive issue presented by this appeal, therefore, is whether the Los Angeles ordinance regulating the conduct of pedestrians at crosswalks is in conflict with the provisions of the Vehicle Code and is for that reason invalid. If so, the giving of conflicting instructions where one is based upon the provisions of an invalid ordinance clearly constitutes error. Borum v. Graham, 4 Cal.App.2d 331, 335, 40 P.2d 866.

Where "municipal affairs" are concerned the Constitution gives authority to local governments to make and enforce laws and regulations subject only to the provisions of their charters. Const. art. XI, § 6. As to such matters local regulations are superior to the provisions of a state statute if there is conflict between the two. Ex parte Helm, 143 Cal. 553, 77 P. 453; City of Pasadena v. Charleville, 215 Cal. 384, 10 P.2d 745; cf. West Coast Adver. Co. v. City and County of San Francisco, 14 Cal. 2d 516, 519–521, 95 P.2d 138. The regulation of traffic upon

the streets of a city, however, is not one of those municipal affairs over which the local authorities are given a power superior to that of the legislature. Ex parte Daniels, 183 Cal. 636, 641, 192 P. 442, 21 A.L.R. 1172; Atlas Mixed Mortar Co. v. City of Burbank, 202 Cal. 660, 262 P. 334; cf. Morel v. Railroad Commission, 11 Cal.2d 488, 500, 81 P.2d 144. The state's control over the regulation of traffic includes the reciprocal rights and duties existing between motor vehicle traffic and pedestrian traffic where conflict between state and local regulation is concerned. Mann v. Scott, 180 Cal. 550, 182 P. 281; In re Murphy, 190 Cal. 286, 212 P. 30; Quinn v. Rosenfeld, 15 Cal.2d 486, 102 P.2d 317. In such a field as that presented in this case where the particular matter is outside the limited group of "municipal affairs," it is clear that local regulations upon the subject may be enforced only if they "are not in conflict with general laws." Const., art. XI, § 11. The applicable rule in these situations where state control is dominant has been stated as follows: "Where the Legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipality with subordinate power to act in the matter may make such new and additional regulations in aid and furtherance of the purpose of the general law as may seem fit and appropriate to the necessities of the particular locality, and which are not in themselves unreasonable." Mann v. Scott, supra, 180 Cal. page 556, 182 P. page 283. The cases in this state have consistently upheld local regulations in the form of additional reasonable requirements not in conflict with the provisions of the general law. Mann v. Scott, supra; In re Hoffman, 155 Cal. 114, 99 P. 517, 132 Am.St.Rep. 75; In re Iverson, 199 Cal. 582, 250 P. 681; In re Simmons, 199 Cal. 590, 250 P. 684; Grant, "Municipal Ordinances Supplementing Criminal Laws," [1936] 9 So.Cal.L. Rev. 95, 98.

This general rule permitting the adoption of additional local regulations supplementary to the state statutes is subject to an exception, however, which is important in the present case. Regardless of whether there is any actual grammatical conflict between an ordinance and a statute, the ordinance is invalid if it attempts to impose additional requirements in a field which is fully occupied by the statute. Thus, it has been held from an early date that an ordinance which is substantially identical with a state statute is invalid because it is an attempt to duplicate the prohibition of the statute. In re Sic, 73 Cal. 142, 14 P. 405; In re Mingo, 190 Cal. 769, 214 P. 850; cf. Stanislaus County, etc., Ass'n v. Stanislaus County, 8 Cal.2d 378, 384, 65 P.2d 1305; Grant, op. cit. supra pp. 95, 96. The court said in the Sic case, supra, 73 Cal. pages 146, 148, 14 P. page 407: "The section plainly covers the

same ground as the Penal Code. It was probably intended to cover some supposed defects in the Penal Code; still it denounces as criminal precisely the same acts which are attempted to be It would seem that an ordiprohibited by the Code. . . . nance must be conflicting with the general law which may operate to prevent a prosecution of the offense under the general law." Paradoxical as it may seem, it is apparent that an ordinance and a statute may be identical under this rule and yet the ordinance is invalid because within the constitutional provision it is in conflict with the statute. Ex parte Daniels, supra, 183 Cal. page 645, 192 P. 442, 21 A.L.R. 1172. The invalidity arises, not from a conflict of language, but from the inevitable conflict of jurisdiction which would result from dual regulations covering the same ground. Only by such a broad definition of "conflict" is it possible to confine local legislation to its proper field of supplementary regulation.

Where a statute and an ordinance are identical it is obvious that the field sought to be covered by the ordinance has already been occupied by state legislation. The exception to the general rule permitting additional local regulation has been also applied, however, in situations where it is not so apparent that the field is already occupied by a statute. In Ex parte Daniels, supra, it was held that, if such was the intent of the legislature, a statute setting up a general scheme for the control of motor vehicles on the highways might constitutionally occupy the entire field so that local ordinances on the subject would be invalid. Murphy, supra: Atlas Mixed Mortar Co. v. City of Burbank, supra; Grant, op. cit. supra 95, 99, 100. "The effect of these several decisions is to declare that, whenever the state of California sees fit to adopt a general scheme for the regulation and control of motor vehicles upon the public highways of the state, the entire control over whatever phases of the subject are covered by state legislation ceases in so far as municipal or local regulation is concerned." Atlas Mixed Mortar Co. v. City of Burbank. supra, 202 Cal. page 663, 262 P. page 336. Under these circumstances, the ordinance is invalid because there is no room left. for supplementary local regulation of the particular subject and any such legislation is necessarily inconsistent with the state law. The difficult question in such cases is whether the state law was intended to occupy the entire field. Where the statute contains language indicating that the legislature did not intend its regulations to be exclusive, the general rule permitting additional supplementary local regulations has been applied. In re Iverson, supra, 199 Cal. page 588, 250 P. 681; Natural Milk Prod. Ass'n v. City and County of San Francisco, 20 Cal.2d 101, 124 P.2d 25: In re Simmons, supra, 199 Cal. page 593, 250 P. 684. Conversely.

where the statute contains express provisions indicating that the legislature intends its regulations to be exclusive within a certain field, the courts have given effect to this intention. Ex parte Daniels, supra, pp. 641-642; Grant, op. cit. supra, at p. 102. As was pointed out in the Daniels case, a mere prohibition of local regulation on a particular subject without any affirmative act of the legislature occupying that field would be ineffective. But where such a declaration accompanied a general scheme for the control of motor vehicles, the court said (pp. 642-643): "It was clearly the intention of the Legislature to declare that the limitation upon speed fixed in the law shall be the only limitation controlling the conduct of the driver of a motor vehicle upon the streets and highways of the state. . . . It cannot be doubted that the Legislature . . . intended to occupy the whole field of traffic regulation, and in construing these prohibitory clauses relating to the powers of local legislative bodies, such provisions should not be ignored as unconstitutional, if a reasonable or even a strained construction can be adopted which would give them a constitutional effect. . . . the purpose of the Legislature to prevent a reduction of speed limits, and a consequent lack of uniformity in such, is apparent. If this was the legislative purpose, such enactment is clearly within the scope of their constitutional power, and local ordinances, fixing other and different rates of speed, ipso facto conflict with the state legislation." See People v. Huchstep, 114 Cal.App. (Supp.) 769, 772, 300 P. 448.

On this appeal plaintiffs urge that the ordinance involved is unconstitutional since it invades a field of traffic regulation which the legislature intended to occupy fully. We think this contention is correct. Vehicle Code, section 458, which is found in division IX, chapter II of that code, provides: "The provisions of this division are applicable and uniform throughout the State and in all counties and municipalities therein and no local authority shall enact or enforce any ordinance on the matters covered by this division unless expressly authorized herein." Express authorization has been granted for local control over such matters as regulating processions, the operation of vehicles for hire and regulating traffic by means of officers or traffic signals. Vehicle Code. § 459. Local authorities are also authorized to enact special rules and regulations dealing with parking of vehicles. Vehicle Code. § 472. The regulation of pedestrian traffic in its use of the public roadways, however, is not a matter concerning which express authorization has been given for local regulation. See Quinn v. Rosenfeld, 15 Cal.2d 486, 490, 102 P.2d 317. It follows that if the use of public roadways by pedestrian traffic is a "matter covered" by the provisions of division IX of the Vehicle Code, the legislature's intent to occupy that field of regulation fully is clearly indicated by section 458 of that code.

Chapter X of division IX, Vehicle Code, § 560-564, is entitled "Pedestrians' Rights and Duties." Section 560 requires the driver of a vehicle to yield the right of way to a pedestrian crossing the roadway within a crosswalk. Section 561 provides that where a pedestrian tunnel or overhead crossing is available, any pedestrian who crosses a roadway by means other than the tunnel or overhead crossing must yield the right of way to vehicles on the highway. Section 562 provides: "(a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway. (b) The provisions of this section shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway." Section 563 states: "(a) At intersections where traffic controlled by a traffic control signal device or by police officers, pedestrians shall not cross the roadway against a red or stop signal. (b) Between adjacent intersections so controlled pedestrians shall not cross at any place except in a crosswalk." Section 564 requires that a pedestrian walk upon his left-hand edge of the roadway outside business or residence districts. It is apparent from an examination of this chapter that the subject of pedestrian rights and duties at crosswalks is a matter covered by division IX of the Vehicle Code. Giving effect to the declaration of intention set forth in section 458, therefore, it is necessary to hold that the regulation of pedestrian traffic at crosswalks is a field intended to be occupied fully by the state legislation. Within such a field there is no scope for the supplementary local regulation ordinarily permissible, and the Los Angeles ordinance must be held invalid under the principles laid down in Ex parte Daniels, supra.

For the reasons set forth herein, we conclude that section 80.38 of the Municipal Code of Los Angeles must be held to be unconstitutional since it conflicts with the Vehicle Code by attempting to legislate upon a subject intended to be covered fully by an act of the legislature. The instruction given by the trial court which was based upon the provisions of the Los Angeles ordinance, therefore, was erroneous and since it conflicted with the instruction based upon the provisions of the Vehicle Code, the error requires a reversal of the judgment. Westberg v. Willde, 14 Cal. 2d 360, 369–371, 94 P.2d 590; Borum v. Graham, supra, 4 Cal. App.2d page 335, 40 P.2d 866; 24 Cal.Jur. 820.

The purported appeal from the order denying a new trial is dismissed. The judgment for defendants is reversed.

That the same act is punished under both a statute and an ordinance does not constitute double jeopardy. Struthers v. Sokol, 108 Ohio St. 263, 140 N.E. 519 (1923). Cf. State ex rel. Keefe v. Schmiege, 251 Wis. 79, 28 N.W.2d 345 (1947). In the Sokol case it was laid down that no conflict can exist unless the "ordinance declares something to be right which the state law declares to be wrong, or vice versa." Earlier, the same court had, by emphatic dictim, declared that a statute creating the same offense as an ordinance could not be made exclusive even by express legislative prohibition of municipal action on the subject. Greenberg v. Cleveland, 98 Ohio St. 282, 286, 120 N.E. 829, 830 (1918). The Ohio court conceives that identical state and local regulations are not conflicting and that the legislature cannot manufacture conflict by merely forbidding municipal legislation as distinguished from regulating a subject by statute. J. B. Fordham and Joe F. Asher, "Home Rule Powers in Theory and Practice" 9 Ohio St. L. J. 18, 26, 47, 63 (1948).

RAISCH v. MYERS

Supreme Court of California, 1946. 27 Cal.2d 773, 167 P.2d 198.

[Action was instituted by A to foreclose the lien of a street assessment. B held a bond supported by an earlier assessment. Contrary to the ruling below, the court found an objection to the validity of B's bond to be without merit. It determined further that B's right of action for foreclosure was barred by limitations. The questions that remained were whether the lien of the assessment survived and, if so, whether B would be entitled to payment out of the foreclosure proceeds before any balance could go to the property owner. The court decided both points favorably to B, the appellant. The portions of the majority and dissenting opinions, which cover the first of these two points, follow.]

SPENCE, JUSTICE. . . . It is expressly provided in section 34 of the ordinance, as engrafted into appellant's bond, that "such lien shall continue until such assessment is fully paid." This purpose to continue the existence of the lien until the assessment is paid is further emphasized by section 40 of the ordinance, which provides that should it appear at any time that the bond "for any reason was invalid," the lien of the assessment "shall continue until such original assessment is fully paid." Despite these express provisions for the continued existence of the lien, respondent nevertheless contends that the lien is extinguished under section 2911 of the Civil Code, which provides: "A lien is extin-

guished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." In support of this contention, respondent cites and relies upon Clark v. City of San Diego, 144 Cal. 361, 77 P. 973, holding that where the right of action for the collection of delinquent taxes was lost, the lien therefor was also lost. That decision was rested squarely upon the provisions of said section 2911. But neither the cited code section nor the cited case is applicable here. Assuming, without deciding, that said section 2911 would be applicable in the absence of the controlling provisions of the ordinance expressly providing for the continued existence of the lien (see, however, Lantz v. Fishburn, 17 Cal. App. 583, 588, 589, 120 P. 1068), the ordinance provisions prevail in the determination of the question under discussion.

The improvement of streets and the collection of the costs therefor are municipal affairs. Admittedly San Francisco being a charter city, its charter supersedes state law in this field, and the provisions of a street improvement ordinance "adopted pursuant to the authorization of the charter have the same sanction and the same effect that they would have had if incorporated in the charter itself." Mardis v. McCarthy, 162 Cal. 94, 100, 101, 121 P. 389, 392; see, also, Hayne v. San Francisco, 174 Cal. 185, 162 P. 625; Larsen v. San Francisco, 182 Cal. 1, 186 P. 757. And ordinance provisions relating to such municipal affairs will prevail over general laws inconsistent or in conflict therewith. 19 Cal. Jur., § 739, p. 411; Ransome-Crummey Co. v. Bennett, 177 Cal. 560, 567, 171 P. 304; Smith v. Lightston, 182 Cal. 41, 47, 186 P. 769.

Carter, Justice (dissenting). I dissent. The obvious error in the majority opinion is that it refuses to apply to this case the provisions of section 2911 of the Civil Code to the effect that a lien is extinguished by the lapse of the time within which an action may be brought under the statute of limitation upon the principal obligation. The question is, as admitted by the opinion. whether or not the provision of the city ordinance that the lien endures until the assessment is paid, deals with a municipal affair. It is conceded that if it does not the state law controls. It is clearly not a municipal affair. It does not deal with an issue between the city and a taxpayer. The assessment is made a lien for the benefit of the contractor performing the improvement work, either directly as a method of paying him, or indirectly by securing the payment of a bond given by the property owner to the contractor. The matter of the continuation of the lien and the issue of the statute of limitation which is inseparably tied thereto is between private individuals, and whether it is substantive or procedural law, it is a matter of the general administration

of justice which cannot be other than a state-wide affair. That proposition is clearly demonstrated by the cases. The issue of the tort liability of a city, a matter of substantive law, is not a municipal affair. Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353; Rafferty v. City of Marysville, 207 Cal. 657, 280 P. 118. Matters relating to limitation of actions (the term within which claims must be filed for tort damage) is not a municipal affair. Kelso v. Board of Education, 42 Cal, App. 2d 415, 109 P.2d 29; Sandstoe v. Atchison, T. & S. F. Rv. Co., 28 Cal.App.2d 215, 82 P.2d 216. Certainly it would not be contended that the statute of limitation is a municipal affair, at least where the action is between two individuals. To so hold would permit the city to regulate the procedure in the courts, the scope of whose jurisdiction is clearly a matter of state concern. It necessarily follows that the effect upon a lien of the statute of limitation on the principal obligation is not a municipal affair. The regulation of garnishment of the salaries of judges of municipal courts is not a municipal affair. Wilson v. Walters, 19 Cal.2d 111, 119 P.2d 340. Even if it be assumed that the development of a city's improvements and city taxation are municipal affairs, the statute of limitation and life of the lien is a state-wide affair and only incidentally affects the development. Such incidental effect does not impair the home rule doctrine. Wilson v. Walters, supra; Department of Water & Power v. Invo Chem. Co., 16 Cal.2d 744, 108 P.2d 410. Hence the provision in the ordinance relating to the duration of the lien is for naught and the case must be viewed as if it did not exist.

This brings us to the question of whether or not, under those circumstances, section 2911 of the Civil Code applies to the lien of assessment of the character here involved. The majority opinion, while not deciding the issue, intimates that it has no application, citing Lantz v. Fishburn, 17 Cal.App. 583, 120 P. 1068. Regardless of that case the law is settled by Clark v. City of San Diego, 144 Cal. 361, 77 P. 973, where it was held that the defense of a lien for delinquent taxes would not lie in an action against the city to quiet title to the property where the right of action for the taxes is barred by the statute of limitation. That right being barred, the lien fell with it by virtue of section 2911 of the Civil Code. See to the same effect: Chambers v. Gibson, 178 Cal. 416, 173 P. 752; Dranga v. Rowe, 127 Cal. 506, 59 P. 944.

In my opinion the judgment should be affirmed.

SCHAUER, J., concurred.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.

Whether power to enact "private law" is embraced within a home rule grant is a question which has received scant judicial attention. Perhaps this is because counsel have not isolated and emphasized this aspect of the subject. The dissenting judge in the Raisch case certainly brought it to light. See also Evans v. Berry, 262 N.Y. 61, 186 N.E. 203 (1933) and Comment 9 Ohio St. L.J. 152 (1948).

In considering the Raisch case it should be borne in mind that under the California home rule system the legislature has power to approve or veto a home rule charter. If it approves, does the charter thereby become, in effect, a legislative enactment?

In re CONDEMNATION of BLOCKS 13, 14 and 15, KOEHLER'S SUBDIVISION, CITY of GRAND ISLAND

NAGLE v. CITY of GRAND ISLAND

Supreme Court of Nebraska, 1943. 144 Neb. 67, 12 N.W.2d 540.

Wenke, Justice. This is a condemnation proceeding by the city of Grand Island under the provisions of section 16-602, Comp. St.1929, to acquire certain property within the city of Grand Island for park purposes. From an award of the appraisers, Sallie Nagle, owner of a part of the property, appealed to the district court for Hall county. From an order of the district court dismissing the action, the city has appealed.

That the establishment of the park within the corporate limits of the city was strictly of local concern and that the city of Grand Island has the right to take the property for park purposes under the power of eminent domain is without question.

The question presented here is whether or not the procedure for condemning this property under the power of eminent domain is a matter of state-wide concern so that when the Legislature provided a procedure therefor, as it did in section 16-602, Comp. St.1929, for cities of a certain class, which class includes Grand Island, such statutory enactment is controlling and the charter provisions of the city, which provide for condemnation as by railroad companies, being ch. 74, art. 3, Comp.St.1929, must yield thereto.

Grand Island adopted a home rule charter in 1928 and under the provisions of section 2, art. XI of the Constitution, its charter must be consistent with and subject to the Constitution and laws of this state. Such cities may provide for the exercise of every power, not contravening constitutional inhibitions, connected with a proper and efficient government of the municipality, but are subject to the general laws of the state, except as to municipal matters of strictly local concern. When the Legislature has enacted a law affecting municipal affairs, but which are also of state-wide concern, such law takes precedence over any provisions in a home rule charter and the provisions of the charter must yield. This same principle is set forth in Axberg v. City of Lincoln, 141 Neb. 55, 2 N.W.2d 613, 614, 141 A.L.R. 894: "The purpose of the home rule charter provision of the Constitution was to render the cities adopting such charter provisions as nearly independent of state legislation as was possible. Under it a city may provide for the exercise of every power connected with the proper and efficient government of the municipality where the legislature has not entered the field. Where the legislature has enacted a law affecting municipal affairs, but which is also of state concern, the law takes precedence over any municipal action taken under the home rule charter. But where the legislative act deals with a strictly local municipal concern, it can have no application to a city which has adopted a home rule charter. Whether or not an act of the legislature pertains to a matter of local or state-wide concern becomes a question for the courts when a conflict of authority arises."

Eminent domain is the right or power to take private property for public use. It belongs to the state and it may be exercised either directly by the Legislature or through the medium of corporate bodies, which includes municipalities, or of individual enterprises to whom it sees fit to delegate such power in the public's interest. While this power may be delegated, it belongs to the state and subject to its control and regulation and is a matter of state concern. Condemnation is the procedure whereby this power is exercised. The exercise thereof may affect every property owner of the state in the matter of his property being taken for a public purpose and fixing the compensation he is to receive therefor.

Uniformity of this procedure, since it may affect every person in the matter of the ownership of his property and the compensation he is to receive, is a matter of state-wide concern and not of strictly municipal or local concern. We have therefore come to the conclusion that the statute providing for condemnation procedure is a matter of state-wide concern applicable in all cities within the class therein designated, which includes the city of Grand Island, whether they be home rule cities or not, and the provisions of the home rule charter of the city of Grand Island must yield thereto.

The action of the lower court in dismissing the action was in error and is reversed, with directions that the action continue under section 16-602, Comp.St.1929.

Reversed.

B. STATE ADMINISTRATIVE SUPERVISION

The home rule movement has not blocked the expansion of state administrative supervision of local government. The latter has been conspicuous in various phases of local finance, which will receive more pointed consideration in a later chapter. State supervision has been extended, moreover, to particular functional There is an obvious state interest in maintaining a minimum level of performance of many functions in the conduct of which local units of government share. So it is, for example, with education, public health services, streets and roads, low-cost housing and slum clearance, law enforcement, fire protection, traffic control, public assistance and the administration of charitable and correctional institutions. Federal social security legislation makes it necessary that a state receiving federal aid for a public assistance program either perform the function directly or exercise rather close supervision over local administration of the program.

The tendency has been away from the passive type of legal requirement, which imposes responsibility but affords no guidance, to the articulation of positive standards of performance. This is a necessary concomitant of the development of effective administrative supervision. That local expenditures will be audited may prevent some fiscal misdeeds, but something more is necessary to effect positive improvement in local financial procedures. Various methods of supervision are at hand. They range from consultation and advice to positive control. The state is not left to the economic persuasions of the grant in aid; it speaks with authority to its own brood.

To conceive of a state supervisory agency as a dictatorial board, passing upon local affairs in a rapid and highhanded manner, is a fallacy. Contrary to a popular misconception, state supervision has not one weapon but a number to draw from—a fact which springs from its fourfold character—control, joint cooperation, service, and advice. Improvement of state and local relations can be attained through a variety of instruments ranging from specific control at one extreme to advice at the other extreme, with tempered supervision in the middle employed more frequently. An integrated administration uses the techniques both of centralization

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and of decentralization as means to the end of enmeshing all the gears of operation so as not to vest supremacy in either the state or locality but to ensure an efficient operation of the complete mechanism.—Wylie Kilpatrick, State Supervision of Local Finance 49–50 (Pub. Admin. Serv. No. 79, 1941).

STATE ex rel. MARTIN v. CITY OF JUNEAU

Supreme Court of Wisconsin, 1941. 238 Wis. 564, 300 N.W. 187.

On November 20, 1937, the State Board of Health and the State Committee on Water Pollution entered an order based upon the following findings:

"From the evidence, records and files in this proceeding it is concluded and found that the discharge of inadequately treated sewage from the City of Juneau and the discharge of untreated milk waste from the Producers Cooperative Association into the drainage ditch causes:

- "1. A menace to public health;
- "2. Nuisance interfering with the peace and comfort of residents and others along the stream;
- "3. Conditions that are destructive to fish and normal aquatic life:
 - "4. Damage to property of riparian owners along the stream;
- "5. Conditions that render the stream unfit for the watering of cattle and other livestock."

Upon the basis of these findings and the evidence upon which they were based, the following order was entered:

"It is therefore ordered:

City of Juneau

- "(1) That the City of Juneau take immediate steps to secure detailed plans and specifications for a complete sewage treatment system or plant adequate to meet local needs, such plans and specifications to be submitted to the State Board of Health for approval in accordance with statutory and code requirements not later than December 31, 1937.
- "(2) That the aforesaid sewage treatment system or plant be installed without delay, such system to be completed and placed in operation not later than November 1, 1938.
- "(3) That the sewage treatment system be so operated and maintained at all times as to prevent objectionable pollution conditions in the ditch."

The order also contained matter affecting the Producers Cooperative Association, not material upon this appeal.

The City of Juneau having failed to comply with the order, the State of Wisconsin upon relation of John E. Martin, Attorney General, commenced this action seeking a mandatory injunction commanding the City of Juneau to comply with the orders of the State Board of Health and the State Committee on Water Pollution, and asking that the City of Juneau be enjoined from discharging inadequately treated sewage into the drainage ditch after a reasonable time to be determined by the court. Attached to the complaint is Exhibit A, containing the recitals and a full copy of the orders made and a summary of the testimony before the State Board of Health and the State Committee on Water Pollution. To this complaint the defendant City of Juneau answered making certain denials and admissions. By way of a further defense the defendant city set up that it has a population of twelve hundred inhabitants, stated the amount of its assessed valuation, the amount of its bonded indebtedness, alleged that the order sought to be enforced was indefinite in certain particulars: that the order made was in excess of the powers conferred by statute upon the State Board of Health and the State Committee on Water Pollution; that the order was not reasonably necessary as a health measure and alleged that it had constructed a septic tank in 1922 which was adequate to dispose of the city's sewage.

To this answer the plaintiff demurred. An order sustaining the demurrer was entered on January 9, 1941, from which the defendant city appeals. . . .

Rosenberry, Chief Justice. We shall first consider what questions are raised by the demurrer to the answer of the defendant city. Such authority as the State Board of Health and the State Committee on Water Pollution have in respect to the matters here under consideration is conferred upon them by ch. 144, Wisconsin Stats. The order in question was signed by the State Board of Health and the Committee on Water Pollution. With respect to the orders made by the State Board of Health, sec. 144.10 provides: "An owner may elect to arbitrate or may bring action against the board in the circuit court for Dane county to determine the necessity for and reasonableness of any order of the board."

With respect to orders made by the State Committee on Water Pollution, sec. 144.56 provides how orders of the committee may be reviewed or the questions with respect thereto arbitrated. The City of Juneau did not pursue the statutory remedies. Because of its failure to avail itself of the remedies provided by statute in this class of proceedings, it is considered that in this action to enforce the performance of the order, the city is foreclosed from raising any questions except (1) the validity of ch.

144 and (2) whether the State Board of Health and the State Committee on Water Pollution acted within the powers conferred upon them by statute. . . .

Section 1 of Article XI of the constitution of Wisconsin provides: "Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes. . . . All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage."

While it is provided by sec. 3 of the same Article that cities and villages organized pursuant to state law are empowered to determine their local affairs and government subject only to the constitution and such enactments of the legislature of state-wide concern, there can be no question but that the promotion and protection of public health is a matter of statewide concern. It is clear that the provisions of our constitution only slightly restrict the power of the legislature over municipal corporations and those restrictions apply only to local affairs. Municipalities obtain no vested right under an act of the legislature, the constitution reserving to the legislature the power to repeal or alter any such act.

Counsel for the defendant in the presentation of this case both in the briefs and upon oral argument gave no consideration to the difference between a municipal corporation and a private citizen as respects the application of the constitutional guaranties. For that reason much of the authority cited and the argument put forth are beside the point. In an effort to establish its contention that the statute is invalid because it is indefinite and uncertain the appellant city argues that sec. 144.53(5) contains no standard or guide to govern the actions of the State Committee on Water Pollution. The section is as follows:

"144.53. Duties of committee on water pollution. It shall be the duty of the committee on water pollution and it shall have power, jurisdiction and authority: . . .

"(5) To issue special orders directing particular owners to secure such operating results toward the control of pollution of the surface waters as the committee may prescribe, within a specified time. If such results are not secured in the specified time, the committee may direct the owner to use or adopt designated systems, devices and methods for handling industrial wastes, refuse and other wastes within a specified time."

Among other things, the appellant city complains of the fact that because the words "operating results" are used and not specifically defined in the act, the statute is invalid because indefinite. Inasmuch as the whole purpose of secs. 144.51 to 144.57 is to prevent the "'pollution,' the contamination or rendering unclean or impure, injurious to the public health, harmful for commercial or recreational use, deleterious to fish or animal or plant life of the waters of the state," Sec. 144.51(4), it would seem to be reasonably plain that an operating result was one which prevented pollution of the lakes, rivers and water courses within the state. Other specific objections are of the same general character and need not be separately considered.

This section gives the Committee on Water Pollution authority to adjust its orders so as to achieve the statutory purpose by some adequate means. The procedure is purely administrative. It is on the executive side and while the Committee or State Board of Health may in certain instances exercise quasi-judicial power, what the statute confers upon them is authority to promote public health. The pollution of the waters of the state is as a matter of common knowledge inimical to public health. If in a particular case the orders either of the State Board of Health or the State Committee on Water Pollution are improper, the remedy is by a review in the manner prescribed by statute. Making an unauthorized order does not render the statute unconstitutional nor is the statute in its terms indefinite and uncertain. The discretion vested in the State Board of Health and in the State Committee on Water Pollution is not arbitrary, it is subject to court review and the rights of all parties are fully protected.

Under the provisions of ch. 144, neither the State Board of Health nor the State Committee on Water Pollution is obliged to postpone action until the health of a community is impaired or some citizen has died as a result of the pollution of the water of the state. The conditions which lead to such a result are well and scientifically known and the power of these bodies extends to prevention as well as to the remediation of conditions which are destructive of the public health.

We find no basis for the contentions made by the appellant city that the State Board of Health and the State Committee on Water Pollution have acted beyond and without the powers conferred upon them by ch. 144. Under the statute the Board may order, where it appears that a municipality is cooperating, that the municipality may prescribe its own plan for abating the evil complained of (sec. 144.53 (4), but where, as here, there is entire lack of cooperation and active opposition, under the statute the Board is clearly empowered to prescribe definitely what shall be done. The legislature apparently assumed that when the fact that conditions deleterious to the health of the public were called to the attention of the local authorities, they voluntarily would proceed to remedy them.

The statute being valid, the Boards having acted within their statutory powers, the trial court properly sustained the demurrer to the answer.

The order appealed from is affirmed.

DUNN v. CITY OF INDIANAPOLIS

Supreme Court of Indiana, 1935. 208 Ind. 630, 196 N.E. 528.

TREMAIN, JUDGE. This action was filed by the city of Indianapolis, as plaintiff below, to enjoin the auditor and treasurer of Marion county, in making up the tax duplicates and collecting taxes upon property within the city, from reducing by two cents the ordinance tax of the city as it had been ordered reduced by the state board of tax commissioners upon an appeal to said commissioners pursuant to the provisions of section 200 of chapter 95 of the Acts of 1927 (page 248) being section 64-1331, Burns' 1933. By petition, the state board of tax commissioners, Zoercher, Showalter, and Wolfard, were made parties defendant to said action.

The complaint is in two paragraphs, the allegations of which recite the necessary statutory steps required to be taken by the officials of the city of Indianapolis in the preparation and determination of the tax levy for the year 1932. It is alleged that ten or more taxpayers of said city filed with the auditor of said county their objections to the city tax levy upon the ground that it provided for the collection of more taxes than the government thereof economically administered would warrant, and asked that the question be certified to the state board of tax commissioners as provided by said act; that pursuant thereto the same was so certified and passed upon by said board of tax commissioners. which board reduced the tax levy one cent on \$100 in each of two funds, viz., the general fund and the park department fund, which reduction had the effect to and did reduce the total tax levy of the city from \$1.08 to \$1.06 on each \$100 of the taxable property of said city.

It is alleged that the order of the state board of tax commissioners in making said reduction is illegal and void, and that section 200 of said act (Acts 1927, pp. 248–251) is unconstitutional, both as to giving the state board of tax commissioners authority (1) over municipal activities in regard to those matters affecting the inhabitants of that community and (2) as authorizing such state board to exercise both legislative and judicial power in matters of taxation. It is specifically alleged that the action of the state board of tax commissioners is unconstitutional and void

as being in conflict with the following provisions of the Constitution of the state of Indiana: Section 1 of article 1 of the Bill of Rights; and section 1 of article 3, section 1 of article 4, section 1 of article 7, and section 1 of article 10, of the Constitution.

Issues were closed and the cause was tried by the court and judgment rendered enjoining the appellees from extending upon the tax duplicates the reduced tax levies, as fixed and determined by the state board of tax commissioners.

For the purpose of this decision it will be assumed that all facts are alleged in the complaint necessary to present the question; likewise facts were introduced in evidence relative to all the taxable property of the city and the amount necessary to be raised for the use of the various departments and funds; that the budget provided for by statute was in due form and complete; that all jurisdictional notices were given and a compliance shown with all laws pertaining to the assessment and levy of taxes upon the property of the taxing unit.

Section 200 of chapter 95 of the Acts of 1927, the constitutionality of which is questioned by the complaint herein, provides that the several tax levies and rates shall be established by the proper legal officers of any municipal corporation after the formulation and publication by them of a budget on forms prescribed by the state board of accounts: that notice be given to the taxpayers: that a public hearing will be had at which any taxpayer may appear and be heard upon the question of any levy or expenditure or other matter pertaining to the several tax levies and rates: that, when the tax levies and rates are finally established by the proper legal officers of any municipal corporation, the same shall be reported to the county auditor and by him to the state board of tax commissioners as provided in sections 197 and 199 of said act (Burns' Ann.St.1933, §§ 64-1329, 64-1330); and that the same shall stand as the tax levies and rates of such municipal corporation for the next year succeeding, subject to the right of ten or more taxpayers of "any such municipal corporation," other than those who pay poll tax only, to file a petition with the county auditor in which "such municipal corporation" is located, setting forth their objections to the levy made or to any item or to any rate thereof. Upon the filing of such petition, the county auditor is required to certify a copy thereof with such other information as will be necessary to present the questions involved to the state board of tax commissioners, "who shall have the power to affirm or decrease said total tax levy or any item thereof of any such municipal corporation after a hearing." It is provided that the hearing must be had in the county in which "such municipal corporation" is located, upon notices thereof to taxpayers; that the finding of the state board of tax commissioners shall be certified to

the auditor of the county, who shall thereupon certify such action to the taxing unit interested, and that the action of the state board of tax commissioners shall be final and conclusive. There is a provision in said section 200 that, if due to an emergency it should be necessary to spend more money than is provided for in the published budget or in the budget as modified by the state board of tax commissioners, such municipal officers are empowered to adopt a resolution and to give notice of intention to make additional appropriations and proceed in a manner similar to that prescribed in the first instant; that ten or more taxpayers may petition to have the question of such extra or additional appropriation or tax levy certified to the state board of tax commissioners.

The General Tax Law of 1919 (chapter 59), section 200 of which was amended by the Acts of 1927, chapter 95, defines the term "municipal corporation" in section 202 thereof, as amended by Acts 1925, c. 142 (Burns' Ann.St.1933, § 64-1333), as follows: "The phrase 'municipal corporation' as used in the five preceding sections shall be deemed to include a county, township, city, incorporated town, school corporation, or any person, persons, or organized body authorized by law to establish tax levies for any purpose."

Both appellants and the appellee agree that the power of taxation is inherent in the state, and is a legislative power limited only by the provisions of the Constitution. Section 1, art. 10, Constitution; State ex rel. Goodman v. Halter, 149 Ind. 292, page 297, 47 N.E. 665, 49 N.E. 7; Beard v. People's Savings Bank, 53 Ind.App. 185, 101 N.E. 325.

The appellee contends that, when a city government is created by an act of the General Assembly, in which a common council is provided for and certain duties delegated to it, in their nature legislative, among which is to make and designate the tax levy of such municipality, such act of the common council is final, and arises to the dignity of a legislative act by the General Assembly; that therefore its power and authority cannot be curtailed or modified as provided in section 200 supra, wherein the General Assembly has delegated to the state board of tax commissioners supervisory authority over the acts of the common council in that respect, nor does such board of tax commissioners possess the power and right under the Constitution to reduce a tax levy established by the common council.

The first two objections made by appellee, that the act in question violates, (1) section 1, article 1, and (2), section 1, article 3, of the Constitution, are answered in Zoercher v. Agler, 202 Ind. 214, 172 N.E. 186, 191, 907, 70 A.L.R. 1232, contrary to appellee's contention. That case also holds that the statute in question does not violate section 19, article 4, and section 6, article 6, of the

Constitution, and that the statute is not violative of the principle of local self-government reserved to the inhabitants of the municipality.

Appellee further contends that said statute is in violation of section 1, article 4, of the Constitution, which provides that the legislative authority of the state shall be vested in the General Assembly, and that it violates section 1, article 7, of the Constitution, which pertains to the judicial powers of the state. These two sections may be considered together.

Under our form of government the three divisions, judicial, legislative, and administrative, are separate and distinct, each possessed of certain governmental powers. Numerous decisions of the Supreme Court hold that neither judicial nor legislative functions can be delegated to administrative or other departments of government. Equally as many Supreme Court decisions hold that boards such as the state board of tax commissioners possess only administrative and ministerial powers delegated by acts of the General Assembly.

In Zoercher v. Agler, supra, it was held that section 200 of the Tax Law here in question, providing for an appeal by ten or more taxpayers, did not confer upon the state board of tax commissioners either judicial or legislative power, but it was held that the power and authority delegated constituted a delegation of ministerial power only, the power to approve or reduce tax rates within the respective municipalities and subdivisions of the state, and that the act of the state board of tax commissioners in thus reviewing the proceedings of a local municipal corporation "is not the exercise of a legislative power." Such has been the holding of this court concerning powers and duties delegated by the General Assembly to the numerous boards and commissions created by law.

Under our legislative system, the General Assembly is in regular session for a period of only sixty-one days in a term of two years. Upon the question of legislation providing for taxation, as well as many other subjects, it is apparent that legislation cannot be enacted, in detail, so as to apply to all conditions in the various subdivisions and municipalities of the state, and therefore some discretion must be lodged in some official board or commission to exercise judgment and discretion as to the application of the Tax Law pursuant to the standard designated by the General Assembly. It sometimes occurs that the discretionary authority so delegated partakes of, and is closely allied to, both the judicial and legislative departments of government, but, so long as such official board or commission is not permitted to render final judgments or to make new laws, it has always been held that such acts are administrative and ministerial, and are necessary to

the orderly administration of the legislative enactments. The state board of tax commissioners is a creature of the statute, and has performed the duties and exercised the functions conferred upon it by statute, and has been acquiesced in by the people of the state for such a long period that this court would not be justified in disturbing its functions and acts except where there is the clearest constitutional transgression.

The city of Indianapolis is in error when it takes the position that the act of its city council in making up the tax budget and passing the tax ordinance constitutes a legislative act in the sense that a law enacted by the General Assembly is a legislative act. Such is not the case. There is but one constitutional legislative body, and that is the General Assembly. Municipal corporations are creatures of the state. They possess such powers only as are granted by the Legislature in express words and those necessarily implied and incidental to those expressly granted, and those indispensable to the declared objects and purposes of the corporation, and to its continued achievements. Central Union Telephone Co. v. Indianapolis Telephone Co., 189 Ind. 210, 126 N.E. 628; Wallace v. Feehan, 206 Ind. 522, 190 N.E. 438; §§ 10304 and 10306, Burns, 1926, §§ 48–1504 and 48–1506, Burns 1933.

The government of the city of Indianapolis, a creature of the Legislature, is part of the taxation machinery, acting in an administrative capacity, subject to the restrictions and limitations imposed by the Legislature. The local government of the city does not act either in a judicial or a legislative capacity in applying the tax laws to the needs and necessities of that unit. It is one of the municipalities defined by the Legislature in section 202, supra. The city's authority, so yested in it by the Legislature, is restricted and limited by a provision that ten or more taxpayers may have a review of the city's acts by the state board of tax commissioners, which board may approve or reduce the amount to be provided and expended in any given fund. No power of legislation, in approving or lowering the tax rates of the municipality. is conferred upon the board. The only power granted is to approve or reduce the amount fixed by the officers of the municipality, acting administratively. Neither the city officials nor the tax board can levy a tax not provided for by the Legislature. No power is delegated to either to legislate upon that subject: nor do they pronounce judgment. They administer the tax laws as required by the Legislature, and pursuant to the method. standard, and rules prescribed by the statute, among which are maximum amounts of the several levies to be made by the local municipalities, and the provision that the state board of tax commissioners only can approve or reduce the levies fixed by the local tax officials.

Lastly, the appellee asserts that the statute is violative of section 1 of article 10 of the Constitution. There is no merit in this contention. So much has been written concerning this section of the Constitution that elaboration is unnecessary. It is understood everywhere that the rate of taxation and assessment in each taxing unit shall be uniform in that unit, and, so long as that uniformity is maintained, the Constitution is not violated. The Constitution does not require that the same rate shall be maintained in the city of Indianapolis as is maintained in the city of Evansville or Fort Wayne or other places. The requirement of section 200, supra, providing for a review by the state board of tax commissioners, does assist to some extent in maintaining uniformity throughout the state. That board is in a position to and has before it facts, figures, and assessments of each municipality in the State of Indiana, and thereby becomes to a certain degree expert in reviewing and reducing, but not raising, the levies of the several municipalities of the state.

From the foregoing the court concludes that the Tax Law under consideration in this appeal is valid, and that the judgment of the lower court is contrary to law and is not sustained by sufficient evidence. Therefore the judgment is reversed, with instructions to proceed in accordance with this opinion.

FANSLER, J., dissents.11

Where state administrative review of the action of local officers or units is provided that recourse must normally be exhausted before one may resort to the courts. Jamouneau v. Board of Commissioners of City of Newark, 132 N.J.L. 117, 39 A.2d 89 (N.J.Sup.Ct.1944).

C. STATE AID

Case materials under this heading are limited. Justiciable questions peculiar to the grant-in-aid device would not be expected to loom large. The prime concern here is to call attention to state allocations or grants to local units as a phase of state-local relations, which influences local objectives and administration. The subject is of great importance; the condition of the

¹¹ The dissenting opinion is set out at 196 N.E. 698. Judge Fansler thought that the local levies were legislative in character. The Oregon court thought so, too. See City of Portland v. Welch, 154 Or. 286, 307, 59 P.2d 228, 236 (1936).

local pocketbook is a factor which obviously conditions both the scope and adequacy of local services. The trend is toward the expansion of governmental activities and services. The general property tax, the traditional mainstay of local government finance, long since proved unequal to the task. Were we to restore vitality to the principle that taxability is the rule, exemption the exception, and were the tax to be administered evenhandedly and efficiently the ad valorem property tax would be much more productive. Those are big "ifs." The inadequacy of the tax as we know it has been greatly accentuated during the current period of rising prices. The costs of government have risen sharply while property tax yields remained fairly constant. To a certain extent the state governments have been by-passed through the device of direct federal aid to local units. At this very writing, however, the clamor of the larger cities, in particular, for state action has reached its highest pitch. The states have had two alternatives: they could either resort to "sharing" of state revenues with local units or authorize local authorities to tap additional sources of revenue. For the most part they have pursued the former course.

A distinction has been made between tax-sharing and grantsin-aid. In the second edition of the valuable pamphlet on State-Collected, Municipally-Shared Taxes, issued by the American Municipal Association in October, 1946, a "shared" tax is defined "as any distribution of a prescribed portion of a state tax back to the localities that is neither (a) measured directly by the need of the receiving governmental unit nor (b) conditioned upon the receiving unit's making specific application therefor and or meeting certain requirements or standards imposed by one or more designated state agencies or officials." The suggestion is that grants-in-aid are not tied to particular levies and are likely to be measured by need, are made only upon application and conditioned upon the meeting of state requirements. In the same report it is observed that the borderline between these two classes of state aid is so indistinct that the Bureau of the Census no longer attempts, in its statistical reports, to separate grants-in-aid from shared taxes.

Since, even in home rule states, state standards of local performance and state administrative supervision of local administration can be widely employed as direct exertions of governmental authority, grants-in-aid are not significant as economic leverage. The prime basis for their use, as well as for sharing taxes, is the plain matter of enabling local units to finance what they are expected to do.

SECTION 3. INTERLOCAL RELATIONS

At the risk of oversimplification, it may be suggested that the vital area in current interlocal relations is the urban fringe of our cities. Metropolitan problems have come to the medium-sized city. The suburb is patently the physical crux of urban planning and zoning. It creates needs for all the facilities and services of modern urban life as well as special integration problems with respect to such matters as sewers, streets, traffic control and public transportation. The movement of population outward, moreover, leaves such intramural problems as blighted area rehabilitation in its wake. Since, for obvious reasons, annexation of suburban areas to a municipality is usually very difficult of accomplishment, direct political and administrative integration is but infrequently effected. Numerous more or less partial measures have been tried. The tendency to enlarge county powers and functions has already been noted in chapter one. Notice has also been taken of resort to ad hoc agencies to bring this or that facility or service to a suburb. Extraterritorial exertion of governmental authority and rendition of services by municipalities are common. City-county consolidation has warm supporters. Of late one hears much of functional consolidation. This idea, in particular, has important applications to situations other than the urban fringe. It embraces cooperative action by overlapping contiguous or neighboring units. This type of cooperation tends to overcome some of the difficulties engendered by the rather artificial geographical pattern of local governmental organization. Cooperative action by local units and, for the most part, extraterritorial activity, depend upon express grants of authority made by positive law.

In the recent revision of the Constitution of Missouri there were added, as Sections 14 and 16 of Article VI, new provisions, which read as follows:

Sec. 14. By vote of a majority of the qualified electors voting thereon in each county affected, any contiguous counties, not exceeding ten, may join in performing any common function or service, including the purchase, construction and maintenance of hospitals, alms houses, road machinery and any other county property, and by separate vote may join in the common employment of any county officer or employee common to each of the counties. The county courts shall administer the delegated powers and allocate the costs among the counties. Any county may withdraw from such joint participation by vote of a majority of its qualified electors voting thereon.

Sec. 16. Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, or with other states or their municipalities or political subdivisions, or with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law.

Sections 1101 and 1102 of the Model State Constitution, issued by the National Municipal League, are also suggestive:

Section 1101. The legislature shall provide by law for the establishment of such agencies as may be necessary and desirable to promote cooperation on the part of this state with the other states of the Union. The legislature may appropriate such sums as may be necessary to finance its fair share of the cost of any interstate activities.

Section 1102. Agreements may be made by any county, city, or other civil division with any other such civil division or with the state, or with the United States for a cooperative or joint administration of any of its functions or powers, and the legislature shall have power to facilitate such arrangements.

The cases which follow present some of the many legal problems of jurisdiction, authority and procedure which arise in interlocal relations.

A. DUPLICATION AND OVERLAPPING 12

STATE ex rel. MOWRER v. UNDERWOOD

Supreme Court of Ohio, 1940. 137 Ohio St. 1, 27 N.E.2d 773.

[R, a taxpayer of the city of Akron, brought mandamus on behalf of the city against the city personnel director and civil service commission to compel them to establish civil service eligible lists for positions in the public health department and against the city director of public health and the health commission to compel them to make appointments from lists so prepared to fill vacancies in the public health department. The city attorney had refused R's request that he bring the action. After issue was joined by R's reply to a joint answer by the defendants the case was tried upon stipulated facts, which sufficiently appear in the opinion. The court below gave judgment for defendants denying the writ.]

¹² Concerning the extent of overlapping affecting cities of over 25,000, see Governmental Units Overlying City Areas (Bureau of the Census, 1947).

DAY, JUDGE. The contention of the relator is that the department of health of the city of Akron, as it now exists, is a department of the city government, functioning as such under the provisions of the city charter, and is, therefore, required to comply with the charter provisions which place all employees of that department in the classified civil service of the municipality.

The respondents counter with the contention that the department of health is an agency of the state, created by the Hughes Act (108 Ohio Laws, part 1, 236) and the Griswold Act (108 Ohio Laws, part 2, 1085) as amended, and as such is governed by the laws of the state and not by city charter; that by virtue of the provisions of the Griswold Act, as amended, the employees of the city department of health are not brought under any civil service requirements.

Protection and preservation of public health are among the prime governmental concerns and functions of the state as a sovereignty. See City of Wooster v. Arbenz, 116 Ohio St. 281, 156 N.E. 210, 52 A.L.R. 518. Under the powers reserved to it by the Constitution, the state, acting through the General Assembly, may enact general laws to that end. See State ex rel. Village of Cuyahoga Heights v. Zangerle, 103 Ohio St. 566, 134 N.E. 686.

In accordance with this reserved power, the General Assembly first enacted the Hughes Act and later, in amended form, the Griswold Act, supra, by the terms of which the state was divided into health districts.

That part of the Griswold Act which was designated as Section 1261-16, General Code, reads: "For the purposes of local health administration the state shall be divided into health districts. Each city shall constitute a health district and for the purposes of this act shall be known as and hereinafter referred to as a city health district. The townships and villages in each county shall be combined into a health district and for the purposes of this act shall be known as and hereinafter referred to as a general health district. As hereinafter provided for, there may be a union of two general health districts or a union of a general health district and a city health district located within such district."

That part of the Griswold Act, which was designated as Section 4404, General Code, reads: "The council of each city constituting a city health district, shall establish a board of health, composed of five members to be appointed by the mayor and confirmed by the council, to serve without compensation, and a majority of whom shall be a quorum. The mayor shall be president by virtue of his office. Provided that nothing in this act contained shall be construed as interfering with the authority of a

municipality constituting a municipal health district, making provision by charter for health administration other than as in this section provided."

In dividing the state into health districts, the General Assembly, in the same act, also repealed the then existing statutes which authorized municipalities to established and appoint boards of health as part of their local governments. This, in our opinion, evidences a legislative intent to withdraw from municipalities the powers of local health administration previously granted to them, and to create in each city a health district which is to be a separate political subdivision of the state, independent of the city with which it is coterminus, and to delegate to it all the health powers thus withdrawn from municipalities. As such, the city health district becomes an agency of the state and is governed by the laws of the state.

To so hold is not to interfere with municipal home rule. By conferring upon cities the authority to rule themselves, the state did not surrender its sovereign power to protect the public health of the state.

Section 3, Article XVIII, of the Ohio Constitution, conferring powers of local self-government upon municipalities, provides: "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." (Italics ours.)

This constitutional provision does not grant absolute powers of self-government, but limits their exercise to matters and things purely local in nature. The protection and preservation of public health is of a state-wide concern, with respect to which the Legislature has jurisdiction.

"The health of the inhabitants of a city and the sanitary condition existing in any one city of the state are of vast importance to all the people of the state because of the danger through social and business relations with other parts of the state of spreading contagious and infectious diseases. For this reason, the state has not delegated to the municipal authorities complete and absolute control over the health of municipalities' inhabitants." 20 Ohio Jurisprudence, 540, Section 5.

Appellant contends that under and by virtue of the proviso contained in Section 4404, General Code, a charter city has the power to provide for health administration, and that nothing in the act contained should be construed as interfering with that power; that "a charter city is authorized to set up a health board different than that provided in Section 4404, General Code, and that is exactly what the city of Akron has done by its charter."

FORDHAM LOCAL GOV.U.C.B .- 9

The proviso contained in Section 4404, General Code, reads: "Provided that nothing in this act contained shall be construed as interfering with the authority of a municipality constituting a municipal health district, making provision by charter for health administration other than as in this section provided."

It is our opinion that under the above-quoted provision, a municipality constituting a city health district is authorized to make reasonable provision, by charter, for supplementing the health administration work covered by the aforementioned section of the statute. To sustain the contention of appellant that the phrase "other than" was used by the Legislature in the sense of "different from" may lead to ludicrous situations, for it is conceivable that local health administration may be so "different from" that provided by statute as to be contrary thereto. The Legislature could not possibly have intended to use the phrase in that sense.

The next question arising is whether the employees of the Akron city board of health are subject to the civil service requirements imposed by general state law.

The Hughes Act (108 Ohio Laws, part 1, 236, at 248) placed the employees of health districts under civil service. That portion of the act which was designated therein as Section 4408, General Code, read:

"In any municipal health district, the board of health or person or persons performing the duties of a board of health shall appoint within the classes fixed by the state civil service commission of Ohio for whole-time service, a health commissioner, a public health nurse and a clerk. It may also appoint physicians, public health nurses and other persons, within the classes fixed by the state civil service commission of Ohio. Where the municipal civil service commission has held examinations for appointment within the classes so fixed, and has certified lists of eligibles for the classes from which appointment is to be made, such appointments shall be made from the lists so certified, but if the municipal civil service commission has not held examinations in accord with the classification made by the state civil service commission, or cannot furnish lists of eligibles for such classes, appointment shall be made from lists of eligibles furnished by the state civil service commission as hereinbefore provided. Where no list of eligibles is furnished by the municipal or state civil service commission, temporary appointments may be made for periods not to exceed ninety days with the consent of the state civil service commission. Provided that the status of persons employed at the time this act shall take effect by a board of health or health department under the provisions of municipal civil service for whole-time service shall not be affected by the passage of this act."

The Griswold Act (108 Ohio Laws, part 2, 1085) amended the above section and omitted therefrom all language having reference to civil service, thereby manifesting a legislative intent, as clearly as if expressed in language, that employees of the health district are to be exempt from the operation of civil service requirements. The Legislature did so, obviously on the theory that it is not practicable to ascertain the merit and fitness of the employees of such districts by competitive civil service examinations. In such determination we find no abuse of legislative authority.

We hold that where the state, by legislative enactment, withdraws from cities the health powers previously granted to them and transfers them to newly created city health districts, such health districts become agencies of the state government, and their employees are governed by state law.

Judgment affirmed.

CITY of GALVESTON v. GALVESTON COUNTY

Court of Civil Appeals of Texas, Galveston, 1942. 159 S.W.2d 976.

Cody, Justice. This appeal involves a conflict of jurisdiction between the City of Galveston and the County of Galveston over the Seawall Boulevard, and the sidewalks adjacent thereto—insofar as the same is situated within the corporate limits of the City. It is, as we view it, a case of the first impression, and comes before us in the form of an appeal from an order granting to the County a temporary injunction restraining the City, and its co-defendant, Dual Parking Meter Company, "from installing, placing or erecting parking meters on the land and premises known as the seawall and Seawall Boulevard and sidewalks, and from drilling and boring holes in or tearing up portion or part of the surface of said seawall and Seawall Boulevard and sidewalks thereof." If there is any substantial evidence to support the exercise of the court's discretion in granting the temporary injunction, such discretion will not, of course, be disturbed on appeal.

The seawall, the Seawall Boulevard, its flanking sidewalks, and the containing-wall, form component parts of the defensive barrier erected against the storm waters of the Gulf. They were erected by the County Commissioners' Court of Galveston County under authority of R.S. Articles 6830 and 6831, which Articles were enacted in virtue of Sections 7 and 8 of Article 11 of the Texas Constitution, Vernon's Ann.St. empowering counties and cities bordering on the Gulf of Mexico to construct seawalls, etc. Article 6830, so far as here relevant, reads: "The

county commissioners' court of all counties . . . bordering on the coast of the Gulf of Mexico, shall have the power and are authorized from time to time to establish, locate, erect, construct, extend, protect, strengthen, maintain, and keep in repair and otherwise improve any sea wall or breakwater, levees, dikes, floodways and drainways, and to improve, maintain and beautify any boulevard erected in connection with such sea wall ." And Article 6831, so far as here relevant, reads: "Said county commissioners' court . . . shall have the power to impose such additional uses and burdens upon all streets, alleys, public highways and other public grounds as they may deem necessary for the location, erection, construction and maintenance of seawalls, breakwaters, levees, dikes, floodways and drainways, and to license, regulate or grant such additional uses of said seawalls, breakwaters, levees, dikes, floodways or drainways as will not impair their efficiency." The greater part of the seawall, the Boulevard, and its flanking sidewalks, was under a proper exercise of the jurisdiction thus conferred upon the Commissioners' Court, constructed within the corporate limits of the City. Johnston v. Galveston County, Tex.Civ.App., 85 S.W. 511; Galveston County v. Gresham, Tex.Civ.App., 220 S. W. 560.

For purposes of this appeal it is not necessary to go into detail in describing the way in which the seawall, Boulevard, and the sidewalks are constructed. The trial court filed conclusions of fact and law. The greater part of the seawall proper, of course, fronts on the Gulf, and the containing-wall parallels the seawall, and the space between the seawall and the containing wall is filled in with sand. Over the top of this sand-fill is constructed the pavement of the Seawall Boulevard, with its flanking sidewalks. The pavement of the Boulevard, and the sidewalks, protect the sand-fill from the action of the storm-waters which are cast up over the seawall. Anything that happened to the pavement of the Boulevard or sidewalks, such as breaking holes in them, which would have the effect of subjecting the sand-fill to the action of the storm waters, and its consequent washing away, and undermining of the pavement, would not only result in great expense to repair and restore the Boulevard, but it would interfere with the efficiency of the barricade as planned and constructed. The jurisdiction to protect and maintain the seawall, the Boulevard and its flanking sidewalks is thus expressly committed to the Commissioners' Court; and this duty and function to so protect and maintain is a governmental one.

On the other hand, the Boulevard, though the land upon which it is erected belongs in fee simple to the County, and though it be not depicted upon any map as a street of the City of Galveston, is unquestionably (so far as here involved) a street within the City of Galveston, and a heavily travelled one. The County makes no contention that the City hasn't jurisdiction to police the vehicular traffic upon the Boulevard, or the pedestrian use of the adjacent sidewalks.

In the exercise of its police jurisdiction over the traffic upon a part of the Boulevard, the City proposed to install parking meters, whereupon the County brought suit to restrain it from so doing. Upon the trial, the City introduced evidence from which it could have been reasonably inferred that the parking meters as installed would not endanger the efficiency of the seawall or the supporting Boulevard with its sidewalks which protect against the storm waters of the Gulf. The parking meters if permitted to be installed were to be placed upon rust-proof standards welded to circular bases about six inches in diameter, which were in turn to be fastened upon the sidewalks by four lag screws, each one-half inch in width, and were to be inserted in a malleable iron expansion shield extending into the pavements and above such base there was to be placed a decorative flange secured by a specially designed lock screw, through which the standards would extend upwards, the standards being about forty inches in height, and the meters to be placed on their tops to be about twelve inches in height, cup grease to be used on both the lag screws and the set screws when they were installed. —the lag screws to be only two inches in length. The City contended that the meters thus installed would not constitute hazards to the strength of the seawall, or the sand-fill, etc., first because they were readily removable in the event of an approaching hurricane; and when removed would leave only four small holes of about three-quarters of an inch in diameter, and about two and a half inches in depth, with the metal shields in them to prevent the entry of water to the sand-fill, and second, that if a standard could not be readily detached it could be knocked down by pulling the lag screws from the holes without tearing up the pavement, and the holes would be too small to allow water to the sand-fill, and thus undermine the pavement. It was shown that it is always known pretty far in advance if a storm is approaching in the direction of Galveston; that it is usually known two or three days in advance if there is any danger of being struck by a storm. The evidence of the County was to the effect that logs and trees and other debris would be washed over the seawall by the storm waters which might be caught and held by the meters against the pavement, holes might be made in the pavement and allow the water to get to the sand-fill or the meters would be torn up by the debris being forced there against, and make holes in the pavement or

walks and thus enable the storm waters to undermine the pavement and sidewalks.

The learned trial judge found that it was difficult to predict what objects would stand or be destroyed, or the manner in which destruction would be accomplished, by the pounding of wind and waves during a hurricane. He found that the County Commissioners and the County Engineer were sincere in their opinion that the meters, if installed would endanger and constitute a hazard to the safety of the Boulevard during a major storm, and that they had, in good faith in the exercise of their discretion, come to this conclusion. But he found further that it was difficult and unsatisfactory to make a finding on such a theoretical point, on which experts differ, and in effect declined to find as a fact whether the installation of the meters would endanger the safety of the Boulevard; he found that the evidence produced by the County was insufficient to convince him of the anticipated destruction in time of storm, but expressed the opinion that the parking meters would be torn from their base before they could cumulate appreciable debris, without breaking up or cracking the concrete through to the sand-fill. He concluded as a matter of law, in effect, that the determination of the County Commissioners in the exercise of the discretion vested in them to protect, etc., the Boulevard, that the erection of the parking meters would endanger the sea wall under the facts of this case, was binding on the Court.

The City predicates its appeal on these two points:

'I. The City was improperly enjoined from the erection of the parking meters upon the sidewalks adjacent to the Seawall Boulevard as an aid in the performance of its duty to regulate and control vehicular traffic upon the Boulevard as one of the streets within the City solely upon the ground that the determination of the Commissioners' Court of Galveston County that the parking meters should not be installed thereon was conclusive of the question as to the authority of the City to install them.

"II. The erection and maintenance of the seawall with its adjacent Boulevard and sidewalks by Galveston County in which the legal title thereto stands and the fact that the Boulevard and its sidewalks were constructed and are maintained by Galveston County as protections to the seawall are insufficient grounds upon which to enjoin the City from using the parking meters in the performance of its duties in the regulation of vehicular traffic upon the Boulevard as one of the public streets within its limits in the absence of a finding by the Court that the installation and use of such meters will in fact seriously affect the efficacy of the Boulevard and its sidewalks as protec-

tions to the seawall, the limitation of the City's jurisdiction over traffic control being dependent upon the existence of such fact and not merely upon the judgment of the Commissioners' Court relative thereto."

The right of a City Council to establish reasonable traffic regulations includes, of course, the right to decide that the installment of parking meters in certain localities where the traffic is dense is a reasonable traffic regulation and pass an appropriate ordinance to effect such regulation, and such decision is treated as controlling on the courts, unless the unreasonableness of the ordinance is fairly free from doubt. Harper v. City of Witchita Falls, Tex.Civ.App., 105 S.W.2d 743, writ refused. The determination by the City to install the proposed parking meters at the proposed places on Seawall Boulevard within the City of Galveston is a determination by the City of the reasonableness of so regulating traffic at such points.

The right of a County Commissioners' Court, within the sphere of its jurisdiction over the seawall, etc., to make decisions relating thereto which will be binding upon the courts is certainly no less than is the right of a City Council to make decisions within the sphere of its jurisdiction which are binding upon the courts. The Seawall Boulevard, at the points thereof involved here, is subject both to the authority of the City Council acting within the sphere of its jurisdiction and to the authority of the Commissioners' Court acting within the sphere of its jurisdiction. The City Council, purporting to act within the sphere of its jurisdiction, has decided that the installation of the proposed parking meters constitutes a reasonable traffic regulation upon the Boulevard. The Commissioners' Court, purporting to act within the sphere of its jurisdiction, has decided that the proposed installation of parking meters is an unreasonable use of the Boulevard in that it will endanger the efficiency of the seawall and the safety of the Boulevard in case of a major storm. Thus we have a conflict of jurisdiction.

However, in the very nature of things, the jurisdiction of the County Commissioners' Court and that of the City Council over the Boulevard are reconcilable. That is to say, the City Council is a governmental body having jurisdiction over the Boulevard to serve certain purposes of the State and the Commissioners' Court is a governmental body having jurisdiction over the Boulevard to serve certain other purposes of the same State, and the State cannot be taken as holding conflicting purposes relative thereto. Now the primary purpose for which the Boulevard was constructed was that it should serve to protect, support and brace the seawall. Indeed, the seawall and the containing-wall, together with the Boulevard, inclusive of the sand-

fill and the covering pavement and cement walks, form component parts of a complex whole; and such whole is primarily dedicated to being used as a barrier to storm waters from the Gulf, and to this use it must be primarily devoted. The right therefore of the public to the use of the Boulevard as a street or highway within the City of Galveston is subordinate and inferior to the right of its use as an integral part of the barrier erected against storm waters from the Gulf. So, when the Commissioners' Court decided that the proposed installation of the parking meters would constitute a lessening of the efficiency of the Boulevard as a barrier against storm waters in the event of a major storm, it was unquestionably acting within the sphere of its jurisdiction. That is not to say that the City Council was not acting within the sphere of its jurisdiction when it decided to install the parking meters; but that the jurisdiction of the City, which in this instance serves but a subordinate right of the public, must yield to the jurisdiction of the Commissioners' Court which in this instance serves a superior right of the public.

It follows that, when the jurisdiction of the City has yielded to the jurisdiction of the County relative to the determination of whether or not the parking meters should be installed on the Boulevard, and such fact is made to appear to the Court, the Court must treat the determination made by the City as beyond the sphere of its jurisdiction or at least as having been superseded, and the determination made by the County as being within the County's jurisdiction. Consequently, the court is not in the position of being required to weigh the reasonableness of the determination by the City to the effect that the parking meters is a proper use of the Boulevard against the reasonableness of the determination by the County to the effect that the proposed installation will lessen the Boulevard's efficiency as a barrier against storm waters in a major storm. The mere occurrence of the conflict of jurisdiction with reference to this particular determination by the County apprises the Court that the jurisdiction of the City has yielded to that of the County. However the determination by the County, acting within the sphere of its jurisdiction, is not necessarily conclusive upon the courts, and we do not understand that the trial court so held. Such determination can be challenged as being so unreasonable, fanciful and arbitrary, as to be void. But, as against such challenge, if it be made to appear that such determination is supported by substantial evidence, as contradistinguished from a preponderance of the evidence on the one hand. or the mere scintilla of evidence on the other, such determination will not be held void. The Court in effect found, as appears above, that the City failed to prove there was no substantial evidence to support the County's determination.

It is not necessary to adjudicate the point whether, in making the determination, the Commissioners' Court exercised quasi-administrative, quasi-legislative, or quasi-judicial power.

No reversible error of law being made to appear, and no abuse of discretion by the trial court having been shown in the granting of the temporary injunction, the judgment of the court below will be affirmed.

Affirmed.

What of local regulatory measures as applied to overlapping units of local government? Would a municipal zoning ordinance or building code bind a school district, for example? Several factors bear on this problem. The state may have preempted the field. The circumstance that the second unit has or has not regulatory power over the subject matter is pertinent. There is the question whether the regulation interferes materially with the public functions and objectives of the second unit. For a recent illustration of the problem see Kansas City v. School District of Kansas City, 356 Mo. 364, 201 S.W. 2d 930 (1947) (Application to school district of city ordinance exacting a fee for inspecting boilers and related equipment upheld).

Taxation by one local unit of the property or activities of another is, like state taxation of a local agency, a matter within the legislative purview unless precluded by particular constitutional limitation. The problem of taxability not infrequently arises under constitutional or statutory exemptions of "public property" from ad valorem taxation. The obvious distinction which has been labored in interpreting such provisions is that between public ownership and devotion to public use. the title theory prevails that pretty well eliminates further questions. The use theory, however, breeds contests based on contentions that this or that use is not public. In an interesting recent Pennsylvania case, a municipal park and golf course which lay beyond the corporate limits, were determined to be "used for public purposes" and thus free from county taxation, within the meaning of an exemption statute, although fees were charged to users and restaurant and refreshment concessions were made in the park. City of New Castle v. Lawrence County. 353 Pa. 175, 44 A.2d 589 (1945). There, of course, the statute expressly embraced the use theory.

The Supreme Court of North Carolina has come around to the use theory despite the literal language of a constitutional requirement that property "belonging" to municipal corporations be exempt. This has not been accomplished without travail. See Albert Coates, "The Battle of Exemptions" 19 N.C.L.Rev. 154, 167 et seq. (1941).

The construction of streets, sewers and other public improvements raises the practical problem of subjecting the public property of other local units of government to special assessments for benefits. It has been held that exemption of public property from taxation is not applicable to special assessments and that an enabling statute, general in its terms, applies to public property such as a courthouse square. Town of Franklinton v. Police Jury of Parish of Washington, 126 La. 2, 52 So. 172 (1910). Even where the property assessed is exempt from seizure the assessment lien may attach and become enforceable if and when the public use of the property ends. City of Monroe v. Ouachita Parish School Board, 172 La. 861, 135 So. 657 (1931). In City of Raleigh v. Raleigh City Administrative Unit and District of State School System, 223 N.C. 316, 26 S.E.2d 591 (1943), it was held that a constitutional provision for exemption of property belonging to municipal corporations did not apply to street improvement assessments against public school property and that, while foreclosure could not be had the school unit could be compelled by mandamus to make provision in its annual budgets for payment of the assessments.

B. EXTRATERRITORIALITY

The exercise of regulatory power over territory beyond the limits of a local unit depends upon statutory authorization. Quite commonly power is conferred to exercise such governmental power over outside land which has been acquired by a unit as a proprietor for anyone of a variety of purposes, including airports, parks and utility enterprises. That type of delegation is easily supportable. City of Birmingham v. Lake, 243 Ala. 367, 10 So.2d 24 (1942); Silverman v. City of Chattanooga, 165 Tenn. 642, 57 S.W.2d 552 (1932). In principle, moreover, the legislature is free to authorize local units to regulate outside persons and their property and business if there is substantial relationship between the regulation authorized and the welfare of those within the unit. The powers conferred in such a case are granted to enable the unit to achieve its destiny within the scope of its own legal objectives. Statutes authorizing municipalities to forbid offensive or unwholesome businesses within a limited distance, such as one mile, of the corporate limits or to pass ordinances to protect extramural water supplies are com-

mon. While generally upheld they are likely to be strictly construed. See Anderson "The Extraterritorial Powers of Cities" 10 Minn.L.Rev. 475, 564, 572 et seq. (1926), 61 Am.L.Rev. 647, 680 et seq. (1926) and collection of cases in Note 55 A.L.R. 1182 (1928). In City of Shreveport v. Case, 198 La. 702, 4 So. 2d 801 (1941), an ordinance forbidding operation of motor boats without mufflers upon a lake constituting the water supply of Shreveport was held ultra vires under a statute which provided: "That the City of Shreveport in the protection and conservation of its water supply is hereby granted full and plenary power over the said lake and may make such rules and regulations for the government thereof as its City Council may from time to time determine . . . " In the State of Washington a constitutional provision granting every general function local unit power to make and enforce police regulations "within its limits" has been construed as an all-embracing limitation which precluded the legslature from devolving extraterritorial power upon a municipality to adopt regulations calculated to protect its water supply. Brown v. Cle Elum, 145 Wash. 588, 261 P. 112, 55 A.L.R. 1175 (1927). Do the guoted words simply mark the limits of the direct constitutional grant to local units or do they limit legislative power as well?

Of special contemporary importance is the exercise by a municipality or county of planning and zoning authority over territory beyond its limits. In the case of a city the power to zone its suburbs, which, in actuality, are a part of the urban community, is intimately related to the well-being of the city. That periphery is the city's vital zoning problem. These factors should be enough to sustain, without more, the grant of power and to leave the legislature free to choose between municipal and county or regional zoning. A special aspect of this subject is presented by airport zoning. The model airport zoning act, sponsored by the Civil Aeronautics Administration and the National Municipal Institute of Law Officers and adopted in a number of states, authorizes a county or municipality to regulate land uses and the height of structures and trees to protect the approaches to airports within its jurisdiction. Similar zoning authority is given a local unit, which owns an airport, to protect its approaches, whether located within or without its limits. In case of conflict the regulations of the proprietor unit are made controlling. The constitutionality of airport zoning has been questioned by a lower New Jersey Court. Yara Engineering Corporation v. City of Newark, 132 N.J.L. 370, 40 A.2d 559 (1945); Rice v. City of Newark, 132 N.J.L. 387, 40 A.2d 561 (1945).

If the extraterritorial police authority conferred upon a local unit goes beyond the achievement of the objectives of that unit can it be sustained on the theory that the state has simply seen fit to employ it in the discharge of that part of the state's total governmental responsibility? The Tennessee Supreme Court gave a negative answer, in a leading case, grounded upon due process and a special provision of the state constitution. Malone v. Williams, 118 Tenn. 390, 103 S.W. 798 (1907). Much was made of the factor of regulation without representation. Does that element make out a denial of due process of law? It obviously does not in the field of taxation. What of the police power?

Concerning the extraterritorial jurisdiction of police officers see (1947) Wis.L.Rev. 401.

A local unit may, in effect, control outside property and activity indirectly by attaching conditions to the granting of permission to market outside products within its limits. Milk regulation is the most obvious example of this sort of thing.

KORTH v. CITY OF PORTLAND

Supreme Court of Oregon, 1927. 123 Or. 180, 261 P. 895, 58 A.L.R. 665.

PER CURIAM. Involved in this decision are two cases commenced against the city of Portland and its officers, seeking to restrain the enforcement of ordinance No. 48244, relating to furnishing milk for the consumption of the inhabitants of the city. One of these suits was instituted by Paul Korth, the other by J. Georgeson. Both plaintiffs produce milk on dairy farms owned by them outside of and in the neighborhood of Portland, but dispose of their products to residents within the city. Each plaintiff contends that the ordinance exacts a license fee from him before he can be allowed to sell milk within the city, whereas the general laws of the state of Oregon prohibit the enforcement of any such requirement. Likewise, they contend that the ordinance invests the city health officer with arbitrary power unregulated by anything but his own whims and caprices. The plaintiff Korth maintains that the milk which he produces conforms to the standard of purity fixed by the ordinance, but that, in producing the same on his dairy farm outside of Portland, he does not have any walls ceiled or painted in the milkroom or washroom, he does not bottle or cap by machine, but does so by hand, and there are no stationary hand basins supplied with running water or connected with any sewer.

The substance of his plaint is that, inasmuch as his milk is admitted by the demurrer to be of standard purity, as he avers.

it is unreasonable and oppressive to compel him to spend large sums of money in changing his dairy buildings so as conform to the requirements of the ordinance. Georgeson contends, not only that the milk he produces conforms to the standard of purity prescribed by the general laws of Oregon, but also that his equipment and dairy likewise comply with those laws, although they do not meet the requirements of the ordinance. The essence of his contention is that, the state having prescribed a standard of purity of the milk and regulations for the operation of dairies, the city cannot enforce different or additional requirements or standards.

After alleging the existence of the city of Portland as a municipality and the official character of its officers, the complaint avers the enactment of the ordinance, No. 48244, approved by the mayor of the city November 13, 1925. The pleading goes on to state, in substance, that the plaintiff for some years has been operating a dairy in Multnomah county, but outside of the city of Portland, and does now transport and has been transporting the milk produced at said dairy into the city, selling and distributing it to customers therein, stating that: "The milk so produced by plaintiff at said dairy and so sold has always been and now continues to be of a standard equal to that prescribed by said ordinance," giving in terms the 8.5 per cent. solids not fat and not less than 3.5 per cent. milk fat, and has a maximum bacterial count of less than 20,000 per cubic centimeter. The plaintiff then goes on and avows that he does not have any ceilings in his barn, nor are the walls ceiled or painted; neither are the walls or ceilings of the milkroom or washroom operated in said dairy ceiled or plastered or painted; that he bottles the milk by hand and not by machine; that he does not have in his milk shed and cow barn operated at said dairy any stationary hand basins supplied with running water or connected with any sewer: that the floors of his dairy barns are not constructed of concrete or other impervious material, nor has the material of which said floors are constructed or the floors themselves been approved by the health officer of the city of Portland. Various other instances of noncompliance with the ordinance are avowed, including the fact that he does not possess a permit to take his milk into the city or offer it for sale there, nor has he obtained a license from the health officer for that purpose. He says that the city officers threaten to enforce the ordinance against the plaintiff by arresting him and charging him with violation of the same in one or more particulars, in which he admits he has failed to obey the ordinance. He also urges that the ordinance is void, in that it takes his property without due process of law: that it is arbitrary and unjustly discriminatory between persons in similar situations; that it vests arbitrary and unlimited power in the health officer, and is in conflict with the laws of the state of Oregon in requiring licenses and permits to sell milk in the city. He charges that all the requirements with which he has not complied are arbitrary and unreasonable, having no purpose except to make the business of dairying more burdensome to small producers of his class. He prays for an injunction against the enforcement of the ordinance, except so far as it prescribes a standard for milk, and provides for punishment for violation of that standard, and that upon final hearing the injunction be made permanent. The circuit court sustained a general demurrer to the complaint, standing upon which and refusing further to plead, the plaintiffs suffered the dismissal of their bill and were cast in costs. They appealed.

After defining "milk," "butter fat," "cream," and other forms of lacteal products, the ordinance proceeds to define "adulterated milk" and how adulteration may be accomplished. Notably, it is that produced from diseased cows, fed on improper food, drawn from dirty cows in unsanitary buildings by milkers whose clothes or hands are not clean, placed in contaminated receptacles, not covered to protect the same from outside contamination, and the like. Other terms are defined and section 3 of the ordinance prescribes that no person shall, within the city limits of the city of Portland, produce, sell, offer, or expose for sale, or have in his possession with intent to sell, any milk or milk product which is adulterated within the meaning of the ordinance. Further on, the city law declares it to be unlawful to sell or offer for sale within the city for human food any milk or milk products without obtaining a license therefor from the health officer of Portland. Among other essentials in an application for a license must appear the name and residence of the applicant, whether he is the producer or not, the exact location of the dairy producing the milk, the number of cows in each herd, as well as other data. Upon filing the application, the health officer is required to cause an inspection of the dairy and herd to be made to ascertain if the same conform in all respects to the ordinance. Certain details of inspection are required and certain fees are exacted for a license to dispose of milk within the city. The health officer is required to inspect samples of milk from each milk producer distributor once every six months. Various specifications are laid down relative to lighting, air space, floors, gutters, ceilings, walls, and utensils. The requirements for cleanliness of buildings, cows, utensils, and operators are quite numerous.

One of the principal contentions of the plaintiff is that the ordinance is an attempt to exercise extraterritorial power. A careful reading of the ordinance, however, despite its many specifications and requirements discloses that the city does not undertake to exercise any authority outside of its municipal limits. As said by Mr. Justice Bean in Sterett & Oberle Packing Co. v. Portland, 79 Or. 260, 269, 154 P. 410, 413:

". . . But in so far as the ordinance prohibits the sale within the city of the products of those places, unless the regulations have been complied with, it is enforceable, and a compliance with the regulations is exacted as a condition precedent to the selling of such products in the city."

Likewise, as declared in Norfolk v. Flynn, 62 L.R.A. 771, in section 1 of the syllabus (101 Va. 473, 44 S.E. 717, 99 Am.St. Rep. 918):

"An ordinance requiring the inspection of milk sold within the limits of the city, and providing for the licensing of vendors, is not void as affecting persons beyond the limits of the municipality, where it only touches those who bring or send their milk into the city for sale."

All other things being equal, the city by virtue of the police power which has been conferred upon it by its charter may say to individuals who bring milk into the city for sale:

"You will be required to operate with herds and appliances prescribed by the ordinance in the production of the milk which you bring into the city for sale to the inhabitants thereof, and the city demands, also, the right to inspect for itself for the benefit of its people the plant which you are operating, to ascertain if, indeed, the milk is produced by the processes required."

In State v. Nelson, 66 Minn. 166, 68 N.W. 1066, 34 L.R.A. 318, 61 Am.St.Rep. 399, Mr. Justice Mitchell discussed this point, an extract from which was quoted approvingly by Mr. Justice Keith in Norfolk v. Flynn, supra, using this language:

". . . The objection is that the provisions of the ordinance are not within the limits prescribed for it by the statute, for the reason that it is attempted to make its operation extraterritorial, in that it provides for the inspection of dairies and dairy herds outside the city limits. There is no merit in this point. The manifest purpose of the statute under which this ordinance was passed was to enable the city council to adopt such reasonable police regulations as would prevent the sale of unwholesome milk within the city, and not merely to prevent the keeping of unhealthy dairy herds within the city limits. It is a matter of common knowledge that much of the milk sold in

a city is produced in dairies situated outside the city limits. Any police regulations that did not provide means for insuring the wholesomeness of milk thus brought into the city for sale and consumption would furnish very inadequate protection to the lives and health of the citizens. It is also a matter of common knowledge, as well as of proof in this case, that the wholesomeness of milk cannot always be determined by an examination of the milk itself. To determine whether it does or does not contain the germs of any contagious or infectious disease it is necessary to inspect the animals which produce it. The inspection of dairies or dairy herds outside the city limits provided for by this ordinance applies only to those whose milk product it is proposed to sell in the city. The provisions of the ordinance in that regard go only so far as it is reasonably necessary to prevent the milk of diseased cows being sold within the city. This inspection is wholly voluntary on part of the owner of the dairy or dairy herd. If he does not choose to submit to such inspection, the result merely is that he or the one to whom he furnishes milk cannot obtain a license to sell milk within the city. The ordinance has no extraterritorial operation, and there has been no attempt to give it any such effect. The only subject upon which it operates is the sale of milk within the city."

It follows that the ordinance attacked by defendants is a valid exercise of the police power of the city of Portland. Plaintiffs have not complied with the valid provisions contained in the ordinance. The decision sustaining the demurrer and dismissing the bill is correct, and the decree of the circuit court is therefore affirmed.¹³

In Wright v. Richmond County Department of Health, 182 Ga. 651, 186 S.E. 815 (1936), the court upheld a county health regulation which flatly forbade the shipment of ice cream into a city within the county from points outside the inspection area of the local board of health. That area consisted of the territory within a radius of 60 miles of the city. Consider the interstate commerce implications of such a regulation. Baldwin, Commissioner of Agriculture & Markets, v. G. A. F. Seelig, Inc., 294 U.S. 511, 55 S.Ct. 497 (1935); Miller v. Williams, 12 F.Supp. 236 (D.C., D.Md., 1935).

¹³ Regulation of the production and distribution of milk and milk products is a matter of vital importance to the public welfare in which federal, state and local governments all have a hand and which constitutes a large subject of study by itself. A wealth of case references may be found in Note 155 A.L.R. 1383 (1945).

CRANDALL v. TOWN of SAFFORD

Supreme Court of Arizona, 1936. 47 Ariz. 402, 56 P.2d 660.

MCALISTER, JUSTICE. This is an appeal by Stan Crandall from a judgment dismissing a complaint filed by him against the town of Safford and its officers in which he sought an order restraining and enjoining them from proceeding with certain contemplated municipal improvements, from issuing the revenue bonds of the city as security for the funds it proposed to borrow from the federal government for this purpose, and from calling a municipal election to authorize the city and its governing body to take such action.

It appears from the record that in the summer of 1935 the town of Safford, desiring to own and operate its own water system, decided that it could do so by taking advantage of the federal government's offer to advance to cities, municipalities, school districts, drainage districts, etc., funds to be used for public enterprises that were beneficial to the political subdivision concerned and at the same time helpful in reducing unemployment and in restoring purchasing power of the people so greatly impaired at that time as a result of the depressed economic condition of the country. The water plant then supplying the town of Safford was owned by the Arizona Edison Company, a public service corporation. To purchase it and make the enlargements and improvements needed required funds in the sum of \$400,000, and the only source of revenue in this amount then available to it was one of the agencies of the federal government, particularly the Federal Emergency Administration of Public Works, which was created by the President of the United States, pursuant to an Act of Congress (40 U.S.C.A. § 401 et seq.). The condition upon which the government offers to cities or other political units funds for such enterprises is that 55 per cent. of the amount advanced be returned and its repayment secured by the general obligation, revenue, or special assessment bonds of the political unit involved, the remaining 45 per cent. constituting a direct gift or grant to the recipient.

To comply with the requirements of this federal agency for the purpose of procuring the funds with which to carry out the contemplated improvements, the mayor and common council of the town of Safford on June 15, 1935, adopted Resolution No. 18, declaring it to be the intention of the town to call a bond election for the purpose of submitting to its qualified electors the question whether it should borrow from the Federal Emergency Administration of Public Works the sum of \$400,000 for financing the purchase, enlargement, and improvements of the water sys-

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tem then serving it and secure the repayment of 55 per cent. thereof, or \$220,000, by issuing its revenue bonds in that sum, payable wholly and exclusively out of a fixed amount of the revenue derived from its water plant and system, the bonds to constitute a first and paramount lien of the amount of the revenue from the water system thus pledged to their payment. The remaining \$180,000, or 45 per cent. of the loan, being a gift or grant, is not to be repaid or evidenced by bonds.

The resolution of intention discloses that the assessed valuation of the property situated within the corporate limits of the town of Safford in 1935 was \$979,388 and that the town has no issued or outstanding bonds, warrants, or other indebtedness except some improvement bonds; that it contemplates purchasing for \$100,000 the Arizona Edison Company's entire water supply system, consisting of a reservoir on Mt. Graham, adjacent to Safford, a pipe line leading from there to said town, the distributing system within the corporate limits of Safford, as well as that outside such limits which includes a pipe line to the adjoining town of Thatcher and the distributing system located therein; that it proposes to use the other \$300,000 for these purposes: To construct and install an underground water collecting system on Bonita creek outside the limits of Safford and install a pipe line from there to Safford; to repair, improve, extend, and reconstruct the water plant and distributing system both in and outside the town of Safford, as well as that both in and outside the corporate limits of the town of Thatcher.

Within a short time after the adoption of Resolution No. 18, Stan Crandall, a qualified elector and real property taxpayer of the town of Safford, filed in the superior court of Graham county an action seeking to restrain the town and its officers from proceeding further with the proposed purchase of the water plant in question and the improvements designated therein, and as ground therefor alleged that the defendants were without power or authority in the premises and that the proposals, as set forth in Resolution No. 18, are illegal, void, and unconstitutional for these reasons:

(3) That the town of Safford has no power or authority to construct and operate a public utility for distribution purposes outside its corporate limits, and especially within the corporate limits of the town of Thatcher, another municipality. . . .

To this complaint the defendants filed a general demurrer which was sustained, and the court, following plaintiff's announcement that he would stand on his complaint, entered judgment in favor of defendants, and the plaintiff appeals therefrom. . . .

If any doubt as to the right of the town of Safford or any municipality within the state to operate a distributing water system outside its boundaries had existed prior to December 14, 1934, it was removed at that time by the enactment of chapter 11, Session Laws of the Third Special Session of the Eleventh Legislature, which provided specifically in section 3 that in addition to the powers it may have, any municipality has the power to construct, improve, extend, operate, and maintain "within or without the municipality" (italics ours) any undertaking, to issue its bonds to finance the costs thereof, and to pledge sufficient of the revenues derived therefrom to pay the bonds and the interest on them.

It might be well to say that even in the absence of express authority, such as that conferred by chapter 11, it is generally held that a municipality may go outside its limits to distribute *surplus* water, light, power, or gas. 19 R.C.L. 788; City of Tucson v. Sims, supra; Orme v. Salt River Valley, etc., Ass'n, 25 Ariz. 324, 217 P. 935; Milligan v. Miles City, 51 Mont. 374, 153 P. 276, L.R.A.1916C, 395; County of Larimer v. City of Ft. Collins, 68 Colo. 364, 189 P. 929; Pikes Peak Power Co. v. Colorado Springs, 105 F. 1, 44 C.C.A. 333.

Appellant contends further that even though a municipality existing under a general charter may operate a water distributing system outside its limits, it cannot do so within the corporate boundaries of another municipal corporation, and this, he urges, is true whether it sells the water to the other municipality itself, the right to collect from those using it therein belonging to the latter, or whether it sells directly to and collects from the users themselves. To do either, according to appellant, is to exercise governmental and proprietary functions within the corporate limits of the second municipality, which under the law belongs exclusively to it, but he cites no authority in support of this contention, reliance being had solely on those few cases holding that a municipality cannot operate outside its own limits. We are unable, however, to see wherein it is material that some of those served live not merely outside the corporate limits of the operating municipality, but within the boundaries of another municipal corporation. Since there is no question of the municipality's right to operate outside its corporate limits, it is not important where those it serves beyond its border reside, whether within or without some other municipal corporation. If the operating municipality is able to obtain acceptable terms from one it desires to serve from its surplus or excess water supply, we know of nothing that would stand in the way of its doing so, any more than would be true in the case of a private corporation that might wish to operate its water system outside the limits of the municipality granting its franchise. It should not be overlooked that in owning and operating its water plant the municipality is acting in a business or proprietary and not a governmental capacity. Subdivision 3 of the syllabus to City of Colorado Springs v. Colorado City, 42 Colo. 75, 94 P. 316, reads as follows:

"It is within the power of a city to make a contract with another city to furnish it water, where it will not interfere with the supply of water to its own inhabitants, since the making of such a contract is not an exercise of its legislative or governmental powers, but is for the private advantage of the city and its inhabitants."

The judgment is affirmed.

LONG v. TOWN OF THATCHER

Supreme Court of Arizona, 1944. 62 Ariz. 55, 153 P.2d 153.

STANFORD, JUDGE. This case comes from Graham County, Arizona, its county seat being Safford. It is a suit brought to enjoin the sale of the property of appellee, Arizona General Utilities Company, a corporation. The sale was about to be made to the Town of Thatcher, a municipal corporation, some three miles west of Safford, when the action was brought by the appellants, all of whom were citizens, taxpayers and property owners of the Town of Safford, incorporated and organized under the general laws of the State of Arizona.

The appellee, Arizona General Utilities Company owns and operates, under a certificate of convenience and necessity granted by the Arizona Corporation Commission, its business, the principal place of which is at Safford, and in Safford there is located approximately 80% of the physical properties of said company, including the generating units, warehouses, etc. Outside of the corporate limits of the Town of Safford are the transmission and distribution lines running to Thatcher and other consumers. The Town of Thatcher consumes approximately 20% of the electric energy of the said utility company, and the property of said company within the corporate limits of Thatcher is transmission lines, transformers, meters, etc., consisting, according to the allegations of the complaint, of less than 10% of the physical property of the company.

In August, 1924, the utility company was granted a franchise by the Town of Safford, and under the franchise said company is now occupying and using the streets, avenues and alleys of said town for the operation and maintenance of its electric lines, distribution system, etc. The expiration date of said franchise is August 19, 1949. The utility company is the only electric utility operating in the Town of Safford, and in that vicinity the only supply of electric energy to the appellants and other residents of the Town of Safford.

The assessed valuation of the holdings and the property of the utility company in the corporate limits of the Town of Safford for the year 1943 was \$116,815, making it one of the largest property taxpayers within Safford.

On May 8, 1942, the question of acquiring said utility was submitted to the property taxpayers of the Town of Safford, and on May 3, 1943, the question of issuing revenue bonds for the purchase of same was submitted to the property taxpayers, and in each instance the taxpayers rejected the proposal.

In June, 1943, the Council of the Town of Thatcher adopted a resolution calling for an election for the purpose of submitting to the real property taxpayers of its town the question of whether or not revenue bonds should be issued in the amount of \$465,000 to be used for the purpose of purchasing property of the utility company, including that portion of its property located in the Town of Safford. This election resolution contained a separate section declaring the matter to be an emergency and providing that it should become immediately effective upon its approval. The election was held pursuant to the resolution and the taxpayers of that place voted in favor of the The Town of Thatcher immediately enissuance of bonds. tered into an agreement for the purchase of the property of the utility company, and thereupon this action was instituted enjoining the officials of the Town of Thatcher from purchasing said property and enjoining the utility company from the sale of same.

Later the Town of Thatcher adopted a resolution which proposed the fixing and prescribing the rates of electric energy to be sold by it from said utility and the action brought alleges that the Town of Thatcher threatens to impose upon appellants and other consumers of electricity outside of the corporate limits of the Town of Thatcher and within the limits of the Town of Safford, rates and charges which are greatly in excess of the rates and charges now in effect and paid by these appellants and other consumers, and it appears that the Town of Thatcher is paying in excess of \$50,000 more than the utility is worth.

The purpose of this action was to enjoin the sale of the utility property to the Town of Thatcher and to obtain a declaratory judgment declaring the rights of the parties. The case was not tried as to the facts, but on motions filed by appellees to dismiss, the trial court, the Honorable C. C. Faires, of the Superior Court of Globe, Arizona, sitting as the Judge at Safford, rendered by an opinion "Judgment dismissing amended complaint as to injunctive relief finding that an actual controversy exists between the parties, and determining such controversy in favor of defendants", from which judgment this appeal is taken.

Appellants claim the following errors were committed by the trial court: . . .

- "3. The court erred in rendering judgment declaring the questions presented by the amended complaint in favor of the defendants and against the plaintiffs for the following reasons:
- "(a) The Revenue Bond Act of 1943 (Secs. 16-2601 to 16-2619, A.C.A.1939–1943 Supp.) does not authorize and empower the Town of Thatcher to acquire and operate the utility described in the complaint in the Town of Safford;
- "(b) The Town of Thatcher has no right, power or authority under the Constitution and laws of Arizona, to acquire or hold the franchise granted by the Town of Safford to the Utility Company; . . .
- "(d) The acquisition and operation of the utility property by the Town of Thatcher would deprive the plaintiffs and all others similarly situated as consumers of the electricity supplied by the Utility Company, residing outside the corporate limits of the Town of Thatcher, of their property without due process of law, in violation of Sections 4 and 17, Article II, Constitution of Arizona, and in violation of the Fourteenth Amendment to the Constitution of the United States; . . "
- The court erred by finding, adjudging and declaring in its judgment rendered and entered, 'That the acquisition by the defendant, Town of Thatcher, of the franchises issued by the Town of Safford and now held by the defendant, Arizona General Utilities Company, and the operation of said utility undertaking thereunder in the Town of Safford, will not impair the obligations of said franchise contract in violation of Section 10, Article I of the Federal Constitution;' because the acquisition of the Utility Company's property in Safford and the transfer to Thatcher of the franchise now held by the Utility Company, and the operation of the utility undertaking thereunder in the Town of Safford, does impair the obligations of the franchise-contract held by the Utility Company, in violation of Section 10, Article I of the Constitution of the United States. as well as Section 25, Article II of the Arizona Constitution."

The action brought seeks to enjoin the governing bodies (sic) of Thatcher from proceeding to acquire from the Arizona General Utilities Company its franchise to operate its electric light and power plant in the town of Safford, proposing itself to acquire such franchise by issuing its bonds as provided in sections 16-2603 and 16-2604, 1943 Sup. to A.C.A.1939.

The statute the Town of Thatcher is proceeding under was passed in March, 1943, and is supplemental to sections 16-602, 16-603, 16-604 and 16-605, A.C.A.1939. Section 16-602 supplements section 5, article 13 of the state Constitution by providing that a municipality may engage in any business or enterprise that a person, firm or corporation may engage in by virtue of a franchise from the municipality, and for that purpose may issue and sell its interest-bearing bonds, and fix rates to be charged for services to the public.

Section 16-603 provides that the authority of the municipal corporation to construct or acquire a plant or property of a public utility must be given by the majority vote of the qualified electors or taxpayers of the municipal corporation.

Section 16-604 authorizes a municipality to purchase the franchise and the property or plant at a fair valuation to be determined as therein stated.

We now quote sections 16-2603 and 16-2604, 1943 Sup. to A.C.A.1939, verbatim for the reason that it is by virtue of these sections that the Town of Thatcher proposes to buy and operate the utility now furnishing the town of Safford electric light and power:

"16-2603. Powers of municipalities.—In addition to any powers it may now have a municipality shall have power: 1. subject to the requirements and restrictions of sections 16-604 and 16-605, Arizona Code of 1939 (sections 3 and 4, chapter 77, Session Laws of 1933, regular session), within or without its corporate limits, to construct, improve, reconstruct, extend, operate, maintain, and acquire, by gift, purchase, or the exercise of the right of eminent domain, any utility undertaking or part thereof, and acquire in like manner land, rights in land, or water rights in connection therewith; 2. to issue its bonds to finance the cost thereof, and, 3. to pledge to the punctual payment of the bonds and interest thereon an amount of the revenue of the utility undertaking, including improvements or extensions thereafter constructed or acquired, sufficient to pay the bonds and interest as the same shall become due, and to create and maintain reasonable reserves therefor. The amount pledged may consist of all or any part of such revenue. governing body of the municipality, in determining the cost of

the utility undertaking for which bonds are to be issued, may include all costs and estimated costs of the issuance of the bonds, all engineering, inspection, fiscal, and legal expenses allowed by law, and interest which it is estimated will accrue on money borrowed or which will be borrowed during the construction period and for six (6) months thereafter." . . .

Before the passage of the bond act of March, 1943, a municipality wishing to operate a public utility furnishing its people with light and power or water could do so by acquiring the utility already performing that function by paying a fair valuation for the plant, to be ascertained in condemnation proceedings. Section 16-603 and 16-604, supra. In other words, the owner of the utility was to be compensated for his property before it was taken. His property could not be taken and operated and paid for out of the revenue collected therefrom. The purchaser was required to pay for the property before operating it or claiming it as his own.

The rule was changed or attempted to be changed by the bond act of 1943. The Town of Thatcher has accepted the offer under that act, and, by a vote of the taxpayers and qualified electors thereof, has obtained permission and authority to issue its bonds for the cost of the "utility undertaking" (including improvements or extensions thereafter constructed or acquired), supplying it and Safford with power, and thereby acquire title to such utility, not only that part located within the limits of Thatcher but also the portion located within the limits of Safford. These bonds, under the law, are issued as the obligation of Thatcher but they and the interest thereon, it is provided, shall be paid out of the revenue collected from the users and patrons of the light and power plants wherever located. By this operation that portion of the light and power plant located in and supplying the residents of Safford is taken from Safford and given to Thatcher without any compensation whatever. Something like 80% of the income from the power plant is paid by the patrons of the Safford plant for which it gives service but obtain no interest in the property of the plant, the title thereto being lodged in Thatcher.

This is a kind of action the law cannot and does not approve or tolerate. It is taking the property of the Safford plant without compensation first being made, which violates section 17, of article 2, of the state Constitution. It takes away from Safford the right to control its streets and to issue a franchise to a power plant to furnish light and power to its citizens, and gives it over to a neighboring municipality.

The case of Crandall v. Town of Safford, 47 Ariz. 402, 56 P.2d 660, 663, is relied on by the appellees herein, together

with other cases, and they set forth that this court has upheld the acquisition and operation of the Town of Safford of a utility serving both Thatcher and Safford, and state that the only difference is that the Crandall case referred to the acquisition of water by Safford wherein it supplied Thatcher, while this is a case of electric power where Thatcher is to serve Safford. From that case we quote the following: ". . . Since there is no question of the municipality's right to operate outside its corporate limits, it is not important where those it serves beyond its border reside, whether within or without some other municipal corporation. If the operating municipality is able to obtain acceptable terms from one it desires to serve from its surplus or excess water supply, we know of nothing that would stand in the way of its doing so, any more than would be true in the case of a private corporation that might wish to operate its water system outside the limits of the municipality granting its franchise."

It can easily be seen that the facts set forth in the Crandall case are not applicable here. With all that we have heard about the Crandall case there has not been presented to us the fact that the Town of Safford has ever consented to the Town of Thatcher coming into its limits.

Such proceedings as these are controlled entirely by that part of our Code mentioned, and we quote these lines from Sec. 16-2618, Act of 1943, "In so far as the provisions of this act are inconsistent with any other provision of law, the provisions of this act shall be controlling."

Sec. 16-2603, supra, under the heading of "Powers of municipalities", says, "within or without its corporate limits, to construct, improve, reconstruct, extend, operate, maintain, and acquire." This section which we say is controlling as to the rights and powers of the municipality of the Town of Thatcher does not by the words "within or without" give it the power to invade the corporate limits of another municipality, but limits its operations to its own territory and territory not within the limits of another incorporated town already furnishing light and power to its inhabitants.

A very important matter to be considered in this case is that the Town of Safford under our law when accepting its electric power from another municipality would be entitled to only the surplus should there be a deficiency in power for any reason. In that respect we quote the following from the case of City of Phoenix v. Kasun, 54 Ariz. 470, 97 P.2d 210, 212: "We have previously laid down certain rules governing municipal corporations operating public utilities, both within and without their corporate limits. They may be stated as follows: (a) a municipal

corporation has a right to furnish water through its municipal water plant to consumers without, as well as within, its corporate limits; (b) while furnishing water in this manner the state corporation commission has no jurisdiction to regulate its actions towards consumers, whether inside or outside of such limits; (c) the legislature is the only body which has the right to regulate the rates charged by a municipal corporation operating a public utility, and it has plenary power in that respect except as limited by the Constitution; (d) a municipality may not compel consumers outside of its corporate limits to purchase water from it, nor can it be compelled to furnish such water to non-residents; (e) a municipality can only dispose of its surplus water outside of its corporate limits subject to the prior right of its inhabitants in case of shortage. . . ."

By the amended complaint we find the allegation that the appellee, Arizona General Utilities Company, is the second largest property taxpayer paying taxes to the Town of Safford, and for the year 1943 the assessed valuation of their holdings and property in Safford was \$116,815. Under decisions of this court there would be no taxes that the Town of Safford could collect when another municipality takes over the franchise and sells its electric power to Safford. The said amended complaint also alleges that the appellants are the owners of real and personal property located within the Town of Safford. It stands to reason that their property would be more heavily taxed in event the appellee should prevail and the Town of Safford would lose one of its main sources of income.

That, together with the fact that the bonded indebtedness to pay for the utility is to be paid under our law by and through the rates charged for electric power, means that the burden must fall heavily on the citizens of the Town of Safford.

The appellees herein in submitting their brief have cited eleven full pages of cases including constitutional provisions, text books and notes, but we feel that this is a matter governed by our statute heretofore existing and supplemented in 1943 and the constitutional provision heretofore cited, and accordingly we are required to adhere to our own law as we see it and as above expressed. The appellees have stated that "The legal questions involved were answered satisfactorily in this court in the case of Crandall v. Safford, 47 Ariz. 402, 56 P.2d 660. The correctness and (sic) the decision in that case has never been questioned", but we have just expressed our views on the applicability of the Crandall case to the case at bar.

The judgment is reversed and the cause is remanded with directions to the trial court to enter judgment for plaintiffs en-

joining defendants from proceeding further with the purchase and sale of the utility involved.¹⁴

Extraterritorial taxation by local governmental units is not a subject of great practical importance. Seldom would there be any effort by a city, for example, to subject property beyond its limits to ad valorem taxation. The subject is affected by a requirement, found in many state constitutions, that ad valorem taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. E. g. Mo. Const. of 1945, Art. X, § 3. Circuses, carnivals and other traveling shows, which exhibit on grounds just beyond corporate limits, present license tax problems. In Virginia a statute authorizing municipal license taxes in such cases was declared unconstitutional as, in effect, an authorization of a taking of private property for private use. Robinson v. City of Norfolk, 108 Va. 14, 60 S.E. 762 (1908). The same result has been reached as to a so-called license fee which was in substance a tax. City of Charlottesville v. Marks' Shows, Inc., 179 Va. 321, 18 S.E.2d 890 (1942). See generally Anderson, "The Extraterritorial Powers of Cities" 10 Minn.L.Rev. 475, 564 et seg. (1926); 61 Am.L.Rev. 647, 671 et seq. (1927).

Suppose a municipal income tax, after the fashion of state income taxes, is laid not only upon the income of residents, whatever the geographical source, but also upon the income of nonresidents derived from activity or property within the municipality? The cities of Columbus and Toledo, Ohio, have imposed flat-rate earnings taxes which do just that. Does the non-resident feature raise any substantial constitutional question? There is a vague suggestion in a recent Missouri case that there might be something wrong with the tax. The court said that a local gasoline tax, for example, has police power implications and obviously one who enters a municipality is subject to the local ground rules. An income tax, on the other hand, was described as a sheer revenue measure. Carter Carburetor Corp. v. City of St. Louis, 356 Mo. 646, 203 S.W.2d 438 (1947). Is the suggested distinction valid? If so, how does it bear on the instant problem of jurisdiction to tax?

¹⁴ Cf. City of Curtis v. Maywood Light Co., 137 Neb. 119, 288 N.W. 503 (1939).

It should be noticed that during the interval between the Safford and Thatcher cases former Governor Stanford succeeded Judge Lockwood on the state supreme court. It is a fair guess that his personality was a great deal stronger then the highly vulnerable reasoning he employed in the Thatcher case.

Exercise of the power of eminent domain beyond the limits of a local unit often becomes quite important. The effective exercise of many city and some county functions may call for outside physical facilities, whether the concern be with airports, utility properties, parks or what not. Legal questions are largely statutory since there is no question but that the legislature may authorize the exercise of the power for local governmental pur-The Uniform Airports Act affords an example of a statutory question. The Act authorizes the acquisition and operation of municipal airports beyond city limits and empowers municipalities to condemn property for the purpose. There is no express reference to property lying in other municipalities. The Supreme Court of Georgia has construed the Act to authorize Atlanta to condemn land situated within the City of College Park. Howard v. City of Atlanta, 190 Ga. 730, 10 S.E.2d 190 (1940).

The courts will not inquire into the occasion for the exercise of the power of eminent domain but they do reserve the final word on the basic question whether the purpose is public. Consider the case where a city undertakes a hydroelectric power project designed to meet the current and prospective needs of the city and environs. If the city is not subject to public service commission regulation would condemnation of outside property for the project be for a public purpose? On the facts presented in Light v. City of Danville, 168 Va. 181, 190 S.E. 276 (1937), noted in 24 Va.L.Rev. 206 (1937), it was determined that that extraterritorial service was incidental and condemnation upheld.

When a state or one of its local units, reaches over into another state to conduct its operations, it leaves the mantle of sovereignty behind. The state "invaded" may exercise governmental authority over the property acquired and the activities conducted within its borders, as fully as with respect to private corporations. State of Georgia v. City of Chattanooga, 264 U.S. 472, 44 S.Ct. 369 (1924) (eminent domain); City of Cincinnati, Ohio. v. Commonwealth ex rel. Reeves, 292 Ky. 597, 167 S.W.2d 709 (1943) (income tax); State ex rel. Taggart v. Holcomb, 85 Kan. 178, 116 P. 251 (1911), writ of error denied Kansas City, Mo., v. State ex rel. Taggart, 226 U.S. 599, 33 S.Ct. 112 (1912) (property tax). See also Mettet v. City of Yankton, 25 N.W.2d 460 (S.D.1946). Tax exemption has been effected on occasion as where Kansas and Missouri, by interstate compact, each exempted the local waterworks property of the Kansas City of the other from taxation. See Speas v. Kansas City, 329 Mo. 184. 44 S.W.2d 108 (1931). With a clear appreciation of these aspects of the subject, the Supreme Court of Tennessee has recently decided that Chattanooga's statutory authority to acquire

property "within or without the corporate limits" for airport purposes enabled the city to purchase an airport tract in nearby Georgia. McLaughlin v. City of Chattanooga, 180 Tenn. 638, 177 S.W.2d 823 (1944). Obviously, different policy considerations should be weighed when it comes to authorizing the crossing of state lines. Would a legislative body passing upon a proposed authorization of unqualified extra-mural activity approach it as extra-state as well? Bernard v. City of Bluefield, 117 W. Va. 556, 186 S.E. 298 (1936), is, perhaps, distinguishable.

In Walker v. City of Cincinnati, 21 Ohio St. 14 (1871), an attack on a Cincinnati project to construct a railroad from that city across Kentucky and Tennessee to Chattanooga failed. There was statutory authority to run a line into another state so long as Cincinnati was one terminus but there was not specific authority for the particular project. The undertaking was financed by the issuance of general obligation bonds and the road remains the property of the city to this day. It is under lease from the city to a private operating company. State ex rel. Forchheimer v. Le Blond, 108 Ohio St. 41, 140 N.E. 491 (1923). Does this mean that New York City could establish a tax-supported trans-world airline with La Guardia Field as home base?

The Ohio Home Rule Amendment (Art. XVIII, § 4) directly empowers every municipality to acquire and operate public utilities "within or without its corporate limits." There is a somewhat similar provision in Section 804(f) of the Model State Constitution.

There are instances of state action empowering officers of another state to exercise governmental authority within their bounds. The Uniform Act on Fresh Pursuit, which has been adopted in a number of states, authorizes a member of a state, county or municipal peace unit of another state to continue in fresh pursuit of arrest and hold in custody one believed to have committed a felony in the other state. Ohio Gen.Code, § 13434-4 et seq. (Page, 1939).

C. COOPERATION

GREENSBORO-HIGH POINT AIRPORT AUTHORITY v. JOHNSON

Supreme Court of North Carolina, 1946. 226 N.C. 1, 36 S.E.2d 803.

[The Authority, by three separate actions, consolidated for trial, sought writs of mandamus against the treasurers of Guilford County, the City of Greensboro and the City of High Point to compel them to pay the Authority appropriations made by their respective governing bodies for the Greensboro-High Point airport from undedicated funds stipulated to have been derived from sources other than ad valorem taxes. In each instance the treasurer had refused payment on the ground that the appropriation was unlawful. Other pertinent facts and the statutory background sufficiently appear from the following excerpt from the statement in the report and the opinion of the court.]

Certain statutes are cited in the stipulation as necessary to a determination of the controversy, which are here reproduced by direct quotation in part, or summarized. . . .

Public-Local Laws 1941, Chapter 98, as amended by 1943 Session Laws, Chapter 601.

The act is captioned: "An Act enabling the County of Guilford to establish an Airport Authority for the maintenance of airport facilities in the County of Guilford for the citizens of Greensboro, High Point, Guilford County and vicinity."

(1) It creates the "Greensboro-High Point Airport Authority" as a body corporate, with powers and jurisdiction enumerated; (2) to consist of five members, two of whom shall be resident voters of Greensboro, two resident voters of High Point, and one from Guilford County at large. One each of these is appointed by the City Council of Greensboro and the City Council of High Point from resident members, and three are appointed by the Commissioners of Guilford County. Their terms are fixed, and they take oaths of office. (3) They constitute a board of directors and pass by-laws relating to management. (4) Power is given them to "purchase, acquire, establish, construct, own, control, lease, equip, improve, maintain, operate and regulate airports or landing fields" within Guilford County; and to "purchase, improve, own, hold, lease and/or operate real or personal property"—to borrow money, issue bonds secured by mortgages with the consent of Guilford County, upon any property held or to be held by it. To sue and be sued; to acquire by purchase lands for construction and maintenance and operation of airports anywhere in Guilford County; to make contracts and hold personal property, and acquire interest in any airport existing in Guilford (4-1) To make rules and regulations and adopt County. schedule of fees and charges not in conflict with State law or rules and regulations of the Civil Aeronautics Administration of the Federal Government. (4-2) To issue bonds, notes or securities upon approval of Guilford County Commissioners and Local Government Commission. (4-3) To dispose of property upon approval of the Commissioners of Guilford County. (4-4) To purchase insurance. (4-5) To authorize or deny or withdraw the right of any person, firm or corporation to construct,

operate or maintain any airport or landing field within Guilford County.

- "Sec. 5. The Airport Authority is hereby authorized and empowered to acquire from the County of Guilford, the Cities of Greensboro, and High Point, by agreement therewith, and such county and cities are hereby authorized and empowered to grant and convey, either by gift or for such consideration as it may be deemed wise, any real or personal property which it now owns or may hereafter be acquired, and which may be necessary for the construction, operation and maintenance of any airport located in the County of Guilford.
- "Sec. 6. Any lands acquired, owned, controlled or occupied by the said Airport Authority shall, and are hereby declared to be acquired, owned, controlled and occupied for a public purpose."
- Sec. 7 authorizes the acquisition of private property for airport purposes by purchase, gift, devise or exercise of the right of eminent domain.
- Sec. 8 requires annual reports to Commissioners of Guilford County. "The said Airport Authority shall be regarded as the corporate instrumentality and agent for the County of Guilford for the purpose of developing airport facilities in the County of Guilford, but it shall have no power to pledge the credit of the County of Guilford, or any subdivision thereof, or to impose any obligation upon the County of Guilford or any subdivision thereof, except and when such power is expressly granted by statute or the consent of the County of Guilford.
- "Sec. 9. All rights or powers given to the counties or municipalities by the statutes of North Carolina, which may now be in effect or be enacted in the future relating to the development, regulation and control of municipal airports and the regulations of aircraft, are hereby vested in the said Airport Authority, and the County of Guilford may delegate its powers under the said acts to the Authority and the Authority shall have concurrent right with the County of Guilford to control, regulate and provide for the development of aviation in the County of Guilford."

Sections 10, 11 and 12 omitted as unessential.

1945 Session Laws, Chapter 137, authorizes investment of funds in certain named securities, purchase of its outstanding bonds and authorizes the Authority to operate on any airport premises "restaurants, agricultural fairs, tracks, motion picture shows, and other amusements."

1945 Session Laws, Chapter 206, captioned as follows: "An Act enabling Guilford County and certain municipalities located therein to issue bonds and levy ad valorem taxes for airports and airport facilities in Guilford County"—purports to authorize

Guilford County and the cities of Greensboro, High Point and Gibsonville to issue bonds, notes, and certificates of indebtedness, when authorized by popular vote in the respective county and municipalities, and levy ad valorem taxes "for the promotion, purchase, operation, repair, maintenance, expansion or construction of airports, airport facilities, and parking areas in Guilford County. It further provides that the act shall not repeal any of the provisions of Chapter 98 of the Public-Local Laws of 1941, as amended by Chapter 601 of the 1943 Session Laws of North Carolina, and shall not be construed as a limitation on powers possessed by the county or municipalities involved; but further provides that all laws and clauses of laws in conflict with the act are repealed "notwithstanding any charter provision of any city or town or any public, local or private act."

Upon the hearing Judge Sink granted writs of mandamus as prayed for, and all of the defendants excepted and appealed.

SEAWELL, JUSTICE. Preliminary to a discussion of the questions involved in the appeal, there are certain postulates which must be conceded:

- (a) The establishment and maintenance of an airport is a public purpose within the objects of municipal expenditure. Goswick v. Durham, 211 N.C. 687, 191 S.E. 728; Turner v. Reidsville, 224 N.C. 42, 29 S.E.2d 211; City of Reidsville v. Slade, 224 N.C. 48, 29 S.E.2d 215.
- (b) It is not a necessary expense, however, and debt may not be incurred or taxes levied for that purpose without a vote of the people. Sing v. Charlotte, 213 N.C. 60, 195 S.E. 271.¹⁵
- (c) Other conditions favorable, the municipality may appropriate for building and maintaining the facility out of funds on hand not obligated to other uses. Goswick v. Durham, supra; Adams v. Durham, 189 N.C. 232, 126 S.E. 611; Nash v. Monroe, 198 N.C. 306, 151 S.E. 634; Mewborn v. Kinston, 199 N.C. 72, 154 S.E. 76; Burleson v. Board of Aldermen, 200 N.C. 30, 156 S.E. 241.
- (d) The municipal authority to construct, maintain and operate such airport may be confided to a municipal corporate authority created for that purpose by appropriate legislative action. Turner v. Reidsville, supra; City of Reidsville v. Slade, supra; Brockenbrough v. Board of Water Commissioners, 134 N.C. 1.

¹⁵ N.C. Const. Art. VII, § 7:

[&]quot;No municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." [Author's note.]

17, 46 S.E. 28; Webb v. Port Commission, 205 N.C. 663, 172 S.E. 377; Wells v. Housing Authority, 213 N.C. 744, 197 S.E. 693; Cox v. City of Kinston, 217 N.C. 391, 8 S.E.2d 252; Mallard v. Eastern Carolina Regional Housing Authority, 221 N.C. 334, 20 S.E.2d 281; Benjamin v. Housing Authority, 198 S.C. 79, 15 S.E.2d 737.

(e) The county and cities concerned may lawfully join in such an enterprise if each of them is benefited by it. G.S. § 63-4.

It is within the stipulated facts that the several appropriations made to the plaintiff are out of funds now in their hands, in each case, not derived from ad valorem taxes, but mainly from the sale of property, and it is not disputed that the funds are free from other specified purpose or legal commitment. There is nothing in the record itself to indicate otherwise, and we are bound by the stipulation on which the court below acted. In this situation no question of credit or taxation in violation of Article VII, Section 7, is involved, and the inhibition constituting the ratio decidendi in Sing v. Charlotte, supra, does not apply.

The main objections which have been urged are that the several acts of the legislature mentioned in the statement have created in the plaintiff a municipal corporation, to all intents and purposes independent and distinct from the county or municipalities it is intended to serve, and have so insulated it as to deprive the municipalities of the legal right to contribute to it under the guise of appropriating money for a public purpose; that the statute fails to give to the municipalities an adequate control of the Airport Authority; and that there is no express language in the act creating the Authority an agent of the Cities of Greensboro and High Point.

These objections are similar in aspect, and the answer to each of them lies in the broad scope of legislative discretion in statutes dealing with Towns and Cities, and in the actual recognition given the plaintiff Airport Authority as an agency of these municipalities and the authority given to Guilford County, Greensboro and High Point to deal with it in the several pertinent statutes made a part of the agreed facts. Chapter 98, Public Laws of 1941, as amended by Chapter 601, Session Laws of 1943, Secs. 1 and 2; Chapter 206, Session Laws of 1945.

Our Constitution does not operate as a grant, but as a limitation on the legislative power; and all powers not withdrawn through its restrictions are reserved to the people to be exercised by their representatives in the legislature. Yarborough v. North Carolina Park Commission, 196 N.C. 284, 145 S.E. 563. Since the prohibition of Article VII, Sec. 7, of the Constitution is concededly not applicable to the present case, and in the absence of other constitutional restrictions, the subjects dealt with in the

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statutes under review fall within these reserved powers. We have no power to review a statute with respect to its political propriety as long as it is within the legislative discretion and has a reasonable relation to the need sought to be accomplished.

"Public Purpose" as we conceive the term to imply, when used in connection with the expenditure of municipal funds from the public treasury, refers to such public purpose within the frame of governmental and proprietary power given to the particular municipality, to be exercised for the benefit, welfare and protection of its inhabitants and others coming within the municipal care. It involves reasonable connection with the convenience and necessity of the particular municipality whose aid is extended in its promotion.

If the appropriations made by the county and municipalities were indeed made, as a mere gift, to another political subdivision, another town or city of an independent governmental capacity, incapable of performing the public service which has become the felt need of the contributing municipality, the authority for such a donation might be questioned. But that situation is not before us. The plaintiff Airport Authority is neither a private corporation nor a political territorial subdivision. It is a quasimunicipal corporation of a type known since McCulloch v. Maryland, 4 Wheat, 316, 4 L.Ed. 579, and commonly used in this and other states to perform ancillary functions in government more easily and perfectly by devoting to them, because of their character, special personnel, skill and care. The legality of the appropriations to its support as involving a public purpose does not depend on the strict propriety of the terms of the creating act as a piece of ideal legislation, as much as it does upon the nearness or remoteness of the benefits enjoyed by the municipality through its operation with respect to the public service sought to be promoted. If the adjuvant corporation is invested with the power and is given the capacity to meet the demand, the legal requirements justifying aid from the public funds have been met. The fact that other and even greater powers have been given to the corporation than those absolutely necessary to the performance of the particular function is, as we have said, a matter within the legislative discretion. Furthermore, the reciprocal and functional relation between the Greensboro-High Point Airport Authority and the cities whose name it bears is outstanding. Proximity to these large communities, which are in key positions with respect to trade and transportation over a wide area, is as essential to the existence of the airport as the latter is to the progress and expansion of the cities themselves and the convenience of their inhabitants and those who communicate or deal with them.

In considering questions concerning the powers conferred on the quasi-municipal corporation and the control over it exercised by the municipality with which it is connected, it must be remembered that counties, cities and towns derive practically all their powers from the legislature, through appropriate statutory law, rather than constitutional grants; and the legislature, in implementing their functions or in creating a separate corporate agency to serve a particular governmental purpose, is not bound by the limitations of the general statute under which the municipalities are formed or the special charters and laws delimiting their authority. It may give to these specially created agencies such powers and call upon them to perform such functions as the legislature may deem best. Brockenbrough v. Board of Water Commissioners, supra.

If we give full faith and credit to this power of the legislature over municipal government, it is clear that we must think in terms of agencies rather than of agents when we speak of ancillary corporations which have been given charge of particular municipal public functions. The powers given to such corporations are direct and legislative, and not conferred by municipal resolution unless the statute should so direct. They are, in fact, agents of the law. In so far as constitutional restrictions are concerned, the General Assembly may distribute the functions of a municipality as it may deem best, the only limitation being its own sound judgment in creating a unified and efficient government. By the exercise of the same sound judgment and legislative discretion, it may, as it has attempted here to do, create a more or less autonomous agency, giving to the municipality only such control as it may consider advisable where the particular functions to be performed involve great detail and complexity. and demand close attention and skilled personnel. Perhaps in no other way could continuity and efficiency in the service be secured against political changes and petty directives.

In the type of corporation we have here control is ordinarily given, as it is here, by a representative directorate chosen by the governing bodies concerned, with such other provisions in the act as will insure to the municipality the integrity of the operations and their continued employment in aid of the public purpose being promoted. Webb v. Port Commission, supra; Wells v. Housing Authority, supra.

The public statute, G. S. § 63-4, permitting the three municipalities concerned to act jointly, is not repealed or modified, or its authority in any way affected by the supplementary acts under which the purpose and policy of the public statute are carried out in the creation of a single Airport Authority to serve

all three municipalities—obviously the only way in which it could be done.

The record itself constitutes a refutation of the theory that the agency thus created is an independent corporation, incapable of performing the public service required of it with respect to Greensboro and High Point, or that it is not committed by the pertinent statutes to supply the public need or convenience thus conceded to be a public purpose, and to the accomplishment of which the municipalities are permitted to spend public money. The airport itself is conveniently located between these populous cities, and they are the immediate beneficiaries of its operation, in so far as the convenience of their citizens is concerned, with respect to mail, freight and passenger service, in all of which the record shows an amazing amount of "on" and "off" traffic flowing to and from these cities, and only remotely to others. In connection with the performance of these services Greensboro and High Point are given, with Guilford County, joint control of the directorate by proportional appointment of its members. In this situation the contention that the Airport Authority is not committed by law to this service and is not an agency of these two cities, and that their contributions are mere gifts to an independent corporation not charged with carrying out any public purpose or any municipal function in which they are directly interested, would hardly be accepted as sound.

In Briggs v. Raleigh, 195 N.C. 223, 141 S.E. 597, the only possible community or municipal benefit to the City of Raleigh discernible in the transaction whereby \$75,000 to \$100,000 was donated to the fair grounds enterprise, and approved by the Court, other than the satisfaction which comes from a benevolent action, was the fact that it increased the City's trade or put its inhabitants nearer the educational enterprise.

The appropriation which a municipality may make to an agency of this sort on the ground that it is a public purpose is not a loan and is not intended to be a lien on its assets. Webb v. Port Commission, supra; Wells v. Housing Authority, supra; Mallard v. Housing Authority, supra; Briggs v. Raleigh, supra, and cases cited infra. Disposition of its property upon liquidation, which is not expected to occur, is a legislative care when the necessity arises.

It is pointed out that the Airport Act expressly declares the Authority to be an agent of Guilford County, but makes no such declaration as to Greensboro and High Point. The question of agency, however, must be determined from the entire Act and from the actual relation of the Airport Authority to the municipal functions of these two cities therein established, and the authority given the cities to deal with it, rather than from any

declaration in the act, especially one which is obviously not intended to be exclusive. Perusal of the Act leaves no doubt that the legislature intended that the Airport Authority should perform for Greensboro and High Point all things necessary for the construction, maintenance and management of airport facilities, which they each might have done independently, but are by public statute, G.S. § 63-4, permitted to do jointly. The Act, as we have seen, gives these two cities participation in the selection of members of the commission, or directors, and their replacement and succession—the right to be exercised by each city independently of any other authority, and makes frequent reference to the duties which the Airport Authority is to perform for these cities. In Section 5—and this should be decisive of the point raised—the Act, as amended, gives to Greensboro and High Point full authority to deal with the plaintiff Airport Authority in language which cannot be construed otherwise than an acceptance and recognition of the challenged agency; indeed, more than that, it does in intent and in effect establish that relationship by direct authority to these municipalities to give to the agency material and substantial support. See Section 5, supra.

In this connection the whole legislation on the subject must be considered in pari materia, and the provisions of Chapter 206, Session Laws of 1945, cannot be ignored. This chapter gives complete and express recognition of the plaintiff Authority as the agency of Greensboro and High Point, as well as of Guilford County; and the authority is given each municipality to deal with it, and upon a plebiscite to lend credit and to issue bonds and raise money for its support. The statutes creating the agency (Chapter 98, Public-Local Laws of 1941, and Chapter 601, Session Laws of 1943) are cited in Chapter 206, supra, and their authority is there expressly preserved. The significance of this later statute lies in the fact that it does not in itself create the agency, but recognizes its creation under the former statutes and the purpose of its creation, and authorizes these municipalities to deal with it and give it aid. Since these cities are given authority to raise money by taxation and expend it in aid of plaintiff agency, the authority is adequate to appropriate for that purpose from surplus and uncommitted funds already on hand. Adams v. Durham, 189 N.C. 232, 126 S.E. 611. It is true they are not proceeding under this statute to raise the funds, but that does not diminish the authority given to deal with the agency when they have the funds which may be applied.

Supplementing what has been said about the complete control of counties, cities and towns by the legislature from which their powers are derived, we might refer to some of the "set-ups"

which have met our approval and compare them with similar features of the act under review.

The Morehead Port Commission was created by Chapter 75, Private Laws of 1933, and the act of creation was reviewed in Webb v. Port Commission, supra. Perusal of the act—which is largely recapitulated in the case cited—will show that there is no control whatever of the Port Commission given to the governing body of Morehead City except that given through the appointment of members of the Commission; and yet the Court upheld the provision permitting financial aid to be given by Morehead City on the principle of its interest in the public purpose being served.

By Chapter 271, Private Laws of 1899, a corporation known as "the board of water commissioners of the city of Charlotte" was created to carry on that function for the city. Apart from the appointment of the members of this board by the Aldermen of Charlotte, there is not a vestige of control given to the City, unless the privilege of locating hydrants and paying for their installation and upkeep could be so considered. Not only did it take away all the powers of the City Board of Aldermen in the premises and give them to the newly created corporation, but the statute provides that the acts of the Water Commissioners shall be deemed the acts of the municipality. The law was amended by Chapter 196, Private Laws of 1903, and came under review here in Brockenbrough v. Board of Water Com'rs of Charlotte, supra. Commenting on this law in the cited case, Justice Connor, speaking for the Court says [134 N.C. 1, 46 S.E. 33]:

"It is clear that the Legislature may, in aid of municipal government, or for the purpose of discharging any municipal functions, or for any proper purpose, create municipal boards, and confer upon them such powers and duties as in its judgment may seem best." (Italics ours.)

In other instances the legislature has gone further and has completely committed municipal functions to a legislative board or corporation without any control of the governing body of the county, and yet the county is required to furnish the finances. Huneycutt v. Board of Road Com'rs, 182 N.C. 319, 109 S.E. 4, dealt with a situation of that kind and found abundant support for its approval in the cases cited on page 321 of 182 N.C., on page 5 of 109 S.E.

The municipalities represented here have attempted to appropriate funds to a public purpose served by a statutory agency in whose appointment they participate and whose benefits are laid upon their threshold. The technical objections to the form of the statute do not outweigh the presence of that reality which

the law and the decided cases have always sought as the determining factor—the relation of the municipality to the public purpose to which it lends its support—the practical satisfaction of the municipal need felt by its inhabitants. If the statute creating the Airport Authority has defects which merit legislative or judicial attention, they are not before us on this appeal.

Unquestionably the immediate future of civil aviation will bring to us results undreamed of; transportation of mail, passengers and freight will reach proportions hitherto thought impossible. Already we have in this method of travel and transportation a rival of all other means now employed; and an opportunity which these cities, amongst our largest and most prosperous, can no more afford to lose than we can afford to deny to them except upon cogent reasons. . . .

The judgment is affirmed.

BARNHILL, JUSTICE (concurring in part and dissenting in part).

I concur in the conclusion that the judgment below, insofar as it requires the treasurer of Guilford County to pay to plaintiff the amount appropriated to its use by the commissioners of Guilford County, must be affirmed. In my opinion, on this record, the appropriations made by Greensboro and High Point are nothing more or less than gifts or grants in aid which these municipalities have no legal right to make. For that reason plaintiff is not entitled thereto. As to them the judgment should be reversed.

The plaintiff corporation was created by and draws its authority from a Special Act of the Legislature, Chap. 98, P.L.L. 1941. Hence the general statute, G.S. § 63-4, which authorizes counties and cities jointly to establish and maintain an airport is not pertinent and has no bearing on the question here presented. About the other postulates initially listed in the majority opinion, insofar as they may affect decision here, there is no divergence of opinion.

It is conceded in the majority opinion that a municipality may expend its funds only for a public purpose and that "public purpose" when used in connection with the expenditure of municipal funds refers to such public purpose within the frame of governmental and proprietary powers given to the particular municipality, to be exercised for the benefit, welfare and protection of its inhabitants and others coming within the municipal care.

Thus we seem to be agreed that the appropriation of public money is permissible only when it is within the functional framework and in furtherance of the governmental or proprietary activities of the particular municipality and that to constitute a public purpose the objective must be directly connected with the local government and tend to promote the general welfare of the residents of the corporate community. Williamson v. High Point, 213 N.C. 96, 195 S.E. 90; Davis v. City of Taylor, 123 Tex. 39, 67 S.W.2d 1033. That is, it must be a corporate purpose directly connected with the local government and having for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity or contentment of the inhabitants or residents within the political division from whence the revenue for its support is derived. Green v. Frazier, 44 N.D. 395, 176 N.W. 11; Lott v. City of Orlando, 142 Fla. 338, 196 So. 313; Platte Valley Public Power and Irrigation Dist. v. Lincoln County, 144 Neb. 584, 14 N.W.2d 202, 155 A.L.R. 412. . . .

So then, briefly stated, we have this situation. Guilford County, through a corporate agency is maintaining airport facilities in Guilford County. It furnished the necessary property and is making contributions toward its maintenance or enlargement. High Point and Greensboro each have appropriated funds to be paid to plaintiff to be used for capital improvements.

Is plaintiff as a matter of law entitled to the funds thus appropriated? The divergence of opinion arises here.

Under some circumstances a municipality may make a contribution to a wholly independent and unrelated corporation for a particular purpose such as to procure the location of some public institution within or near its bounds. Briggs v. Raleigh, 195 N.C. 223, 141 S.E. 597; Annotation: 46 A.L.R. 679, 698, 737. Such occasions are rare—and this is not one of them. Ordinarily public money is expended in furtherance of governmental and proprietary objectives either directly by the municipal authorities or indirectly through corporate agencies.

We are agreed that the maintenance of an airport is a "public purpose" in which a municipality may engage for and in behalf of its citizens either directly or through the agency of an "adjuvant" corporation. So then, concededly, decision here rests squarely upon the question whether plaintiff is the instrumentality or agent of High Point and Greensboro. This is the crux of the case.

In answering this question in the affirmative the majority opinion reasons thus: Plaintiff is operating an airport in Guilford County which serves the residents of High Point and Greensboro. These cities have statutory authority to operate airports and they are mentioned "frequently" in the Special Act creating plaintiff. Therefore, although plaintiff, by express provisions of the Act creating it, is made the instrumentality and agent of Guilford County only, it is in fact also the corporate agent of these two cities. It being their agent, they may appropriate funds for its support.

In my opinion the conclusion is a non sequitur. The Act under which plaintiff operates makes it the corporate agent of Guilford County. Expressum facit cessare tacitum.

The county alone exercises supervisory control. While the existence of the right of control in the principal or parent corporation is not an absolute essential, its existence in the one municipality to the exclusion of the others is significant. Expressio unius est exclusio alterius.

I readily concede that under G.S. § 63-4 High Point or Greensboro, either separately or jointly with Guilford County, may acquire and maintain an airport and use non-tax funds for that purpose without first submitting the question to the voters for their approval. The point is they have not undertaken to do so. When Guilford County elected to seek special legislative authority to operate its airport through a corporate agency it elected to act alone and not in co-operation with other municipalities.

Of course High Point and Greensboro receive direct benefits from the operation of the airport. They are component parts of the county which was created for the very purpose of serving its people, including those residing within the two cities. Any governmental or proprietary activity of the county naturally reacts to their advantage. But the mere fact the airport is an instrumentality of Guilford, is located near these two cities, and the county thus renders a service for them which they could provide for themselves does not make it their agent or warrant the conclusion that the operation of the airport is within the compass of the corporate activities of these cities or either of them.

When we adopt the majority view, read into the special statute an intent it does not express, and hold to the contrary, we in effect declare that every activity of a county constitutes a "public purpose" for each and every town or city within its bounds.

A municipality is not the giver of gifts. Briggs v. Raleigh, supra. Even with express legislative authority it cannot pay gifts or gratuities out of public funds or assume any function which is not within the compass of its own corporate activities or usual or necessary powers. Brown v. Board of Com'rs, 223 N.C. 744, 28 S.E.2d 104; Madry v. Scotland Neck, 214 N.C. 461, 199 S.E. 618; Williamson v. High Point, supra; 38 Am.Jur. 85, Sec. 395, and 91, Sec. 399. It must confine itself to the business of government for which it was created and its proprietary powers are to be exercised primarily for the advantage of the compact community. Asbury v. Albemarle, 162 N.C. 247, 78 S.E. 146, 44 L.R.A., N.S., 1189.

A public auditorium, Adams v. Durham, 189 N.C. 232, 126 S.E. 611, or a public library, Westbrook v. Southern Pines, 215 N.C. 20, 1 S.E.2d 95, within Greensboro is as to that municipality a public purpose. While High Point may maintain an auditorium or library for itself, I assume no one would seriously contend that it could appropriate funds in aid of such institution in Greensboro. It seems to me to be equally illogical to say that High Point and Greensboro can make a grant or gift to maintain the corporate agency of Guilford. When we so hold we go a full bowshot further than this or any other court has heretofore gone.

The cases cited in the majority opinion sustain the position that a municipality may act through a corporate agency, which is conceded. No one of them, however, has any bearing on the question of the legality of the proposed appropriations.

Briggs v. Raleigh, supra, is more nearly in point, but that case is easily distinguishable. There the appropriation or contribution was made to obtain the location of a public institution near the boundary of the city and comes within the principle enunciated in the line of decisions there cited. Annotation: 46 A.L.R. 679, 698, 737.

The 1945 amendment, Chap. 206, Session Laws 1945, is an enabling Act. Whether the Legislature may thus empower the cities named to lend their credit to and guarantee the obligations of the plaintiff is not before us for decision. It contains no provision which alters or attempts to alter the then existing status of plaintiff in its relation to these cities, and it expressly provides that nothing therein contained shall be construed to repeal any of the provisions of the 1941 Act, one of which makes plaintiff an agent of Guilford County.

Even if it be conceded that this amendment in effect authorizes Greensboro and High Point to adopt plaintiff as their instrumentality and agency the fact remains the plaintiff has not elected to so allege, and it is not so found or stipulated although expressly denied in the further answers.

As to High Point there is another serious question. It adopted a 1945-1946 budget in part as follows:

"Special appropriations are hereby made out of monies derived from the sale of properties and the amount appropriated to Greensboro-High Point Airport Authority is for construction of capital improvements and in the sum of \$25,000."

Ordinarily cities obtain funds with which to buy property through taxation. When tax money is used to purchase property and the property is sold, the money received therefrom is in a legal sense derived from taxation. The conversion and reconversion do not change its essential nature as tax money. The appropriation, as required by statute, G. S. § 160-434, specifies the source of the money for its payment—proceeds from the sale of property. It must be made, if at all, as directed. The parties stipulate: ". . . and the city of High Point has on hand funds not derived from ad valorem taxes as aforesaid with which to pay the aforesaid appropriation."

Is this a stipulation of fact that the property sold was not purchased with tax money, or an erroneous conclusion that proceeds from the sale of property which was acquired through taxation are not derived from ad valorem taxes? It is not clear the parties meant the first. It would seem to be the latter. In any event it is left in serious doubt and for that reason plaintiff has not shown a clear legal right to this appropriation.

In filing this opinion I have sought merely to state the reasons why I cannot concur in the conclusion of the majority. In the light of what I have said it has been thought advisable to amplify the majority opinion by way of reply and further argument. Even so, I have no desire to engage in a running debate. As I have expressed my understanding of the law as applied to the facts appearing in this record I am content. I add only this:

- (1) It is now contended that although plaintiff was created and activated under a special Act which defines and limits its authority we may apply the general statute.
- (2) The majority opinion as originally drafted is bottomed on a fact which is neither alleged in the complaints nor stipulated in the agreed facts, but which is expressly denied in the answers. To warrant relief in a mandamus proceeding there must be allegation and proof or admission sufficient to disclose a clear legal right to the relief demanded. Here it is granted on a fact which is specifically denied and unrefuted by allegation or finding of fact.
- (3) Now it is said that we are dealing with agencies and not agents, and that plaintiff is an agency which "serves the convenience" of Greensboro and High Point, and this is sufficient to justify and authorize the appropriations. This, to my mind, is notable for its novelty.
- (4) Neither the financial condition of plaintiff nor the rosy future of aviation, separately or in combination, justifies the appropriations.
- (5) In Webb v. Port Commission the right of Morehead City to make contribution toward the support of the Port Commission was not at issue. Brockenbrough v. Board of Water Com'rs of Charlotte is similarly distinguishable. The other authorities cited are so different factually they have no application here.

It may be that upon proper allegation and finding the 1945 amendment, Chap. 206, Session Laws, 1945, could be given an intent and meaning that would support an affirmance. Be that as it may, on this record the plaintiff, in my opinion, has failed to show a clear legal right to the relief demanded as against Greensboro and High Point. Hence I vote to affirm the judgment in the case against the treasurer of Guilford County and to reverse as to the treasurers of High Point and Greensboro.

The further reformation of the majority opinion comes so late it leaves me no time within which to make this dissent, conform to its outline without causing undue delay in final decision. I must rest content with its present form.

WINBORNE, J., joins in this opinion.16

In Board of Education of City of Corbin v. City of Corbin, 301 Ky. 686, 192 S.W.2d 951 (1946), a constitutional provision forbidding a municipality to appropriate money for any corporation was deemed to deny a city power to appropriate money to an independent coterminous school district to supplement teachers' salaries.

A case of unusual interest in the field of interlocal relations is State ex rel. Great Falls Housing Authority v. City of Great Falls, 110 Mont. 318, 100 P.2d 915 (1940). In connection with a public housing project in Great Falls the municipal housing authority made a so-called "cooperation contract" with the city, which contained an undertaking by the city to vacate certain streets in the project and to zone and rezone that area. Later, after federal financial assistance had been obtained and construction contracts let, a new city council balked on the stipulated street vacation and zoning. The housing authority obtained mandamus to compel compliance with the contract. The case is discussed in Note 50 Yale L.J. 525 (1941).

An important phase of intergovernmental co-operation is the work of the numerous state, national and international voluntary leagues or associations of governmental units or officials. Municipal leagues and county commissioners' associations, or the equivalent exist in most of the states. There are regional organizations such as the Pacific Coast Board of Intergovernmental Relations, which is a medium for consultation on West Coast problems. See Miriam Roher, "Coast States Try Cooperation" 34 Nat.Mun.Rev. 484 (1945). On a national scale we find such groups as the American Municipal Association, Amer-

¹⁶ The concurring opinion of Judge Denny is omitted.

ican Public Welfare Association, American Public Works Association, American Society of Planning Officials, American Society for Public Administration, Civil Service Assembly, Council of State Governments, Federation of Tax Administrators, Municipal Finance Officers Association, National Committee on Municipal Accounting, National Association of Assessing Officers, National Association of Housing Officials and National Institute of Municipal Law Officers. The city managers have an important international organization, the International City Managers' Associa-The Municipal Law Section of the American Bar Association is composed largely of attorneys who represent local government or who are concerned in their practice with local government law. There is a European-born International Union of Local Authorities and in this hemisphere the Pan-American Congress of Municipalities for which the Pan-American Commission on Intermunicipal Cooperation, with headquarters in Havana, serves as board of directors and secretariat. See Carlos M. Moran, "Era of Cooperation for Cities" 34 Nat.Mun.Rev. 499 $(1945)^{17}$

Private agencies such as the National Municipal League, whose object is improvement in government at the state and local levels, are active catalysts in the process of intergovernmental cooperation.

These groups are strong enough to be influential in the political realm but they serve most effectively as media for improving public administration through conferences, research and publication of information, studies and "model" materials.

May public funds be expended to pay dues or other expenses of participation in, say, a state municipal league? Surely, we should be able to make out public purpose in the constitutional sense. In a 1944 Arizona case the City of Phoenix was enjoined from the payment of dues to the Arizona Municipal League on the theory that the purpose was not public. City of Phoenix v. Michael, 61 Ariz. 238, 148 P.2d 353 (1944). Four years later,

¹⁷ The Public Administration Service, a consulting, research and publishing organization, serves as a joint publishing agency for most of the groups listed here. Its headquarters are in Chicago.

¹⁸ With reference to the League's stated objective, training municipal officials in municipal affairs, the court offered the following rather astounding comment: "The mere statement of these propositions we think condemns them. No greater affront can be offered an aspirant to public office than that he is not qualified. It seems to be the rule that qualification to get in office is a guarantee of qualification to fill it competently. That is the American idea. The officers of the state's incorporated cities and towns, in seeking office, doubtless would most strenuously resent, as would their constituents, a suggestion that they were not qualified to discharge the duties of the office." 148 P.2d 353, 355.

in a forthright opinion, the Arizona Court overruled the Phoenix decision. City of Glendale v. White, 194 P.2d 435 (Ariz. 1948). It has been held in Ohio that the constitutional grant to municipalities of all powers of local self-government does not embrace the power in question. State ex rel. Thomas v. Semple, 112 Ohio St. 559, 148 N.E. 342 (1925). The middle position of insisting that the outlay be grounded upon express statutory authority is more easily supported. Such authority has been granted in a number of states. There is, at the other extreme, the view that the power may be implied. Tousley v. Leach, 180 Minn. 293, 230 N.W. 788 (1930). An interesting statute of the state of Washington, which requires coordination of county administrative programs in highway, social security and other matters, authorizes the counties to designate the Washington State Association of County Commissioners as a coordinating agency and to pay the Association for services rendered. The act has been sustained over various legal objections. State ex rel. Cruikshank v. Baker, 2 Wash.2d 145, 97 P.2d 638 (1940).

Minnesota has a functional consolidation statute which provides that "Two or more governmental units, by agreement entered into through action of their governing bodies, may jointly exercise any power common to the contracting parties." The authorities of a county and city were contemplating the construction of a city-county hospital but had not entered into an agreement for a joint project. A favorable result was reached at a county election on the project and on a bond issue to cover the county's share of the cost. County taxpayers thereafter sought to enjoin the bond issue and project. In affirming a judgment sustaining a general demurrer to the complaint the court, two judges dissenting, rejected the contention that an agreement covering the joint project was a prerequisite to a bond and project election. Kaufman v. Swift County, 225 Minn. 169, 30 N.W.2d 34 (1947).

City-county relations have attracted a great deal of attention in recent years. It has been suggested as to metropolitan districts, that the conventional pattern of two general function units of local government overlying the same area involves needless complexity, duplication and expense as well as potential conflicts. Why not set up one governmental organization to carry on what has traditionally been separate county and city business? It might be added that city-county consolidation constitutes one method of attacking the difficult problems presented by the existence of peripheral municipalities and the urban fringe in general. San Francisco provided the first instance of what may broadly be described as city-county consolidation. The City and County of San Francisco dates from 1856. John C. Bollens, Patricia W. Langdell and Robert W. Binkley, Jr., County Govern-

ment Organization in California 37 (Univ. of Calif. Bureau of Pub.Admin., 1947). The City and County of Denver is another conspicuous example. The number of city-counties is still less than a dozen, although constitutional authority is not wanting in several states, but live current discussion in various metropolitan communities may be speak further consolidations within the near future. The latest converts are the City of Baton Rouge and East Baton Rouge Parish, Louisiana, which adopted a city-parish home rule charter under a special constitutional amendment in 1947.

City-county separation, in contrast with consolidation, withdraws the city from the county and imposes upon the city the performance, within its limits, of both city and county functions. (Since both San Francisco and Denver were separated from the remainder of the old counties of which they had been parts, those units have, with good technical basis, been classified as examples of city-county separation. Charles M. Kneier, City Government in the United States, 373 [Rev. ed. 1947]. Actually, the distinction does not appear important in those instances.) In Virginia all cities of 10,000 or more inhabitants are separated, made islands within their several counties. This device puts an end to overlapping but it creates boundary problems and may leave an inadequate area and economic base for the county as a general function unit of government. County consolidation is an answer to the second difficulty as it might be in an area like the Tennessee Valley where the counties have lost much territory by inundation. As we have already seen in this chapter (p. 57), there may be constitutional requirements as to local electoral approval. which render county consolidation difficult. M. H. Satterfield, "Counties in a Straitjacket" 37 Nat.Mun.Rev. 81 (1948).

SECTION 4. FEDERAL-LOCAL RELATIONS

A. INTERGOVERNMENTAL IMMUNITY

The doctrine of intergovernmental immunity is not to be found in any express constitutional provision. It derives instead from the nature of the Federal system. It is conceived that at neither level can government achieve its ends in its constitutional sphere if it is to be subject to material interference by governmental action at the other level. The doctrine is in principle, a broad one, although its active development has been in the field of taxation. In recent years it has been given much more guarded application by the Supreme Court but the essential principle remains. Within its purview local units, as instrumentalities of the state, stand on a footing with the state.

General consideration of the subject is most appropriate for a course in Constitutional Law but its practical importance here is such as to warrant brief treatment.

(1) Taxation

The doctrine does not work evenly; the Federal Government and the states do not stand on a parity. In the first place, we are told that since the Federal Government is one of delegated powers, supreme in its sphere, all of its operations are to be deemed governmental. Thus, all enjoy the protection of the doctrine and the imposition of state or local taxes, special assessments or fees directly upon federal property or activities is barred. United States v. County of Allegheny, 322 U.S. 174, 64 S.Ct. 908 (1944); Mayo v. United States, 319 U.S. 441, 63 S.Ct. 1137 (1943); John K. and Katherine S. Mullen Benev. Corp. v. United States, 290 U.S. 89, 54 S.Ct. 38 (1933). See the language of Mr. Justice Stone in Graves v. The People ex rel. O'Keefe, 306 U.S. 466, 477, 59 S.Ct. 595, 597 (1939). The states and their local units, on the other hand, can and do engage in activities which the courts have in the past considered non-governmental and for that reason beyond the reach of the immunity. The result is that a given activity would be treated as governmental if conducted by the Federal Government even though deemed non-governmental when carried on by a state. The Supreme Court has recently, however, thrust aside the dubious "governmental versus proprietary" test of state immunity without giving us any clear idea in its stead. The Court, in State of New York v. United States, 326 U.S. 572, 66 S.Ct. 310 (1946), held that the sale by New York of Saratoga Springs mineral water was subject to the federal soft drinks tax. In an opinion, concurred in only by Mr. Justice Rutledge, Mr. Justice Frankfurter indicated that he would uphold nondiscriminatory federal taxation of a state which tapped sources of revenue "not uniquely capable of being earned only by a State." Chief Justice and three other members, in concurring, agreed that the governmental versus proprietary formula was untenable but insisted that a nondiscriminatory federal tax might yet be so onerous as to burden unduly the conduct of state affairs. Two dissenting justices, Douglas and Black, were fearful that the position of the states was being seriously weakened. They, too, would reject the old formula but with different consequences: they, quite significantly, would treat all state activities as governmental and within the reach of the immunity.

The Federal Government enjoys the additional advantage of being able, by express statutory exemption, to prevent state taxation of subjects not covered by the constitutional immunity. Maricopa County v. Valley National Bank, 318 U.S. 357, 63 S.Ct.

587 (1943); Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 62 S.Ct. 1 (1941); Pittman v. Home Owners' Loan Corp., 308 U.S. 21, 60 S.Ct. 15 (1939). The states must rest upon the constitutional immunity alone.

Instead of the doctrine operating to the serious prejudice of the Federal Government in obtaining public revenues, as was once feared, were it liberally applied in favor of the states [South Carolina v. United States, 199 U.S. 437, 26 S.Ct. 110 (1905)], the converse has been more nearly the case. Projects such as TVA have removed huge areas from the ambit of local taxation. The Government has sought to meet the situation, at least in part, by making voluntary "in lieu" payments to the affected taxing units. The use of the device raises technical questions of practical import for local government, since the funds received are, legally, gifts which in some cases might not, without statutory amendment, be subject to the same controls as funds raised by local taxation. See Alex T. Edelmann, "The T.V.A. and Intergovernmental Relations" 37 Am.Pol.Sc.Rev. 455 (1943).

In 1948 Congress (by Public Law 548, 80th Cong., 2d Sess.), amended Section 8 of the Reconstruction Finance Corporation Act to retain exemption of the corporation and its franchise, capital, reserves, surplus and income from federal, state and local taxation and to permit state and local ad valorem taxation of any real property of the corporation to the same extent as other real property and to permit imposition of special assessments for local improvements on such real property.

Income tax immunity of the salaries of public employees belatedly went by the board in the thirties. Helvering v. Gerhardt, 304 U.S. 405, 58 S.Ct. 969 (1938) (federal taxation of state employee); Graves v. People of the State of New York ex rel. O'Keefe, 306 U.S. 466, 59 S.Ct. 595 (1939) (state taxation of federal employee). In 1943 Congress adopted the withholding plan of collecting the income tax on wages and salaries at the source. IRC § 1621 et seq. This imposes a specific burden upon state and local governments; they have become unpaid Federal revenue collection agencies. The constitutionality of this as a compulsory procedure has not been tested. In Commonwealth of Kentucky v. Dennison, Chief Justice Taney said: "And we think it clear that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it. . . . " 24 How. 66. 107. 16 L.Ed. 717, 729 (1861). What would be the legal sanctions available to the Federal Government? Available economic leverage is more obvious.

The state and local units levying income taxes may resort to the withholding device. The City of Columbus, Ohio, has recently done so. Could it be enforced as to federal employees? The answer is clearly "no."

The Comptroller General has recently ruled that withholding could not be required, under an Oregon income tax law, as to the salaries of federal employees. Comp.Gen.Dec. B–72432, Jan. 6, 1948.

The much-debated federal income tax immunity of the income from state and local securities still survives. The statutory exemption of interest upon the obligations of a state or any "political subdivision" of a state is given liberal interpretation. It has been applied to bonds of the Port of New York Authority, a hybrid New York-New Jersey agency. Commissioner of Internal Revenue v. Shamberg's Estate, 144 F.2d 998 (C.C.A.2d, 1944), cert. den. 323 U.S. 799, 65 S.Ct. 433 (1945). So long as the exemption continues there is no way to get the Supreme Court to re-examine the immunity rule established in Pollock v. Farmers Loan & Trust Co., 157 U.S. 429, 158 U.S. 601, 15 S.Ct. 673, 912 (1895). The court in the Pollock case reasoned that the United States lacked power to tax the interest paid on municipals because it could not tax the source of that income. Recently, in sustaining state income taxation of rents from out-of-state realty, the Court declared that income does not necessarily share an immunity enjoyed by its source. People of the State of New York ex rel. Cohn v. Graves, 300 U.S. 308, 57 S.Ct. 466 (1937).

The states and cities have vigorously opposed any threat of change. The economic basis for their case is obvious. The immunity does mean substantially lower net interest costs. legal position ultimately comes to this-removal of the immunity would hit at a vital power of state and local government, the borrowing power, and would tend to, if not, destroy state and local autonomy. They insist that this would be the case even though the federal tax were non-discriminatory and interest on state and local bonds was simply included in the computation of the net balance of income of the taxpaying bondholder. It is true, as we have already seen, that the immunity rule does not work evenly and were it repudiated as to federal taxation of the income from state and local bonds, it is unlikely that the Supreme Court would open federal securities to state and local income taxation independently of Congressional consent. Even so, the student is asked to weigh for himself the state and local autonomy argument. Why would state sovereignty be impaired if a state or municipality were required to enter the money market on substantially even terms with other borrowers?

For a full statement of the views of the defenders of the immunity, see The Constitutional Immunity of State and Municipal Securities, A Legal Defense of the Continued Integrity of the

Fiscal Powers of the States, by the Attorneys General of the States (undated, circa 1939). Those who support the immunity readily point out that "everyone who purchases an exempt security pays a tax to the issuing government, since he accepts a lower interest yield." Henry Epstein, "Self-government versus Federal Taxation of Your Local Securities" 6 Leg. Notes on Local Gov't 187, 190 (1941). Is there a constitutional necessity that Jones, a resident of New York, pay a tax to Sacramento, California, in the event that he invests in bonds of that city? Does it have standing to call on him for support as a taxpayer? If the lender is, in effect, paying a tax to the borrower is he getting interest in keeping with its true credit? The most thorough exposition of the views of the opponents of the immunity rule is to be found in a study made by the Department of Justice and published in 1938 under the title "Taxation of Government Bondholders and Employees."

Interest rates on municipals dropped to unprecedented low levels during the War years. Some financially strong communities took advantage of the situation by issuing bonds before the proceeds were actually needed at rates around one per centum and investing the funds in federal obligations bearing higher rates of interest. Baltimore's astute use of this device is reported in 34 Nat.Mun.Rev. 589 (1945). The borrower's "tax" on the bondholders may have accounted fully for the difference in rates. Note also the Alabama device of investing refunding bond proceeds in federal obligations and holding them as a trust fund until non-callable original bonds came due. Taxpayers and Citizens of Shelby County v. Shelby County, 246 Ala. 192, 20 So.2d 36 (1944).

It is plain that the immunity does not extend to capital gains realized on the sale of municipals. Willcuts v. Bunn, 282 U.S. 216, 51 S.Ct. 125 (1931). See R. T. Boehm, "Taxing Refunded Municipals" 26 Taxes 787 (1948).

The contention that the Sixteenth Amendment, by authorizing taxation of income "from whatever source derived, and without apportionment among the several states," is a grant of power which has swept aside the immunity has not prevailed. The Supreme Court has embraced the view that the intent of the Amendment was simply to free income taxation of the rule of apportionment among the states by population which applies to direct taxes. Brushaber v. Union Pacific R. R. Co., 240 U.S. 1, 36 S.Ct. 236 (1916). Evans v. Gore, 253 U.S. 245, 40 S.Ct. 550 (1920). The Department of Justice study mentioned above, amassed a large amount of contemporary evidence, not considered in the Brushaber and Gore cases, which lent support to a contrary in-

terpretation and led to the conclusion that the subject should be re-examined by the Supreme Court.

Property taxation of public securities is another matter. An income tax simply falls on the net balance of the income of the taxpayer, whether his gross income consists of interest on bonds or what not. A property tax would be imposed on the contract itself. The immunity rule is hardly in any jeopardy in this area. See the Department of Justice study, at p. 30, citing cases. On the other hand, local property taxation of an unliquidated claim due from the United States to a contractor has recently been upheld. Smith v. Davis, 323 U.S. 111, 65 S.Ct. 157 (1944), discussed by T. R. Powell, "The Remnant of Intergovernmental Tax Immunities" 58 Harv.L.Rev. 757, 788 (1945).

It is worth noting that there are quite a number of federal excise taxes, from which the states and their local units as purchasers are expressly exempt. It is up to the particular unit to be alert to take advantage of these exemptions in accordance with the prescribed exemption certificate procedure.

(2) Regulation

CASE v. BOWLES

Supreme Court of the United States, 1946. 327 U.S. 92, 66 S.Ct. 438.

Mr. Justice Black delivered the opinion of the Court.

The Congressional Enabling Act providing for the State of Washington's admission to the Union granted certain lands to that State "for the support of common schools." Section 10. 25 Stat. 676, 679. Section 11 of the Enabling Act provided that these lands should "be disposed of only at public sale, and at a price not less than ten dollars per acre The State Constitution, art. 16, §§ 1, 2, provides that these lands shall not be sold except "at public auction to the highest bidder" at a price which may not be below both the full market value found after appraisal, and "the price prescribed in the grant" of these lands. In 1943 the State Commissioner of Public Lands held a public auction for the sale of timber on school lands. At that auction the Soundview Pulp Company, one of the respondents, bid \$86,335.39 for some of the timber. This amount exceeded by approximately \$9,000.00 the ceiling price fixed by Maximum Price Regulation No. 460. The Price Administrator advised Soundview that consummation of the sale at the bid price would constitute a violation of the Regulation and of the Emergency Price Control Act. Thereafter Soundview and the unsuccessful bidder. Coos Bay Pulp Corporation, commenced actions in the

State Courts, seeking an adjudication as to the legality of Soundview's bid and of the proposed transfer of timber to Soundview. This resulted in a holding by the State Supreme Court that the Emergency Price Control Act did not bar the sale of school-land timber at prices above the ceiling. Soundview Pulp Co. v. Taylor, 21 Wash.2d 261, 150 P.2d 839. When, after this judgment was rendered, the parties were about to complete the sale, the Price Administrator commenced this action in the federal District Court to enjoin the State Commissioner of Public Lands and Soundview from completing the timber transaction at a price above the ceiling fixed by the Regulation. The District Court held that the Emergency Price Control Act did not grant the Price Administrator authority to set maximum prices for school-land timber sold by the State. The Circuit Court of Appeals reversed. 9 Cir., 149 F.2d 777. Because the Circuit Court's decision conflicted with that of the Supreme Court of Idaho in Twin Falls County v. Hulbert, Idaho, 156 P.2d 319, we granted certiorari in both cases.

We now turn to petitioner's Constitutional contention. Though as we have pointed out petitioners have alleged that the Act applied to setting a maximum price for school-land timber violates the Fifth and Tenth Amendments, the argument here seems to spring from implications of the Tenth Amendment only. The contention rests on the premise that there is a "doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its power so as not to interfere with the free and full exercise of the powers of the other". It is not contended, and could not be under our prior decisions. that the ceiling price fixed by the Administrator is Constitutionally invalid as applied to privately owned timber. Yakus v. United States, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834; Bowles v. Willingham, 321 U.S. 503, 64 S.Ct. 641, 88 L.Ed. 892. Nor is it denied that the Administrator could have fixed ceiling prices if the state had engaged in a sales business "having the incidents of similar enterprises usually prosecuted for private gain." Allen v. Regents of University System, 304 U.S. 439, 452, 58 S.Ct. 980, 985, 986, 82 L.Ed. 1448. But it is argued that the Act cannot be applied to this sale because it was "for the purpose of gaining revenue to carry out an essential governmental function—the education of its citizens." Since the Emergency Price Control Act has been sustained as a Congressional exercise of the war power, the petitioners' argument is that the extent of that power as applied to state functions depends on whether these are "essential" to the state government. The use of the same criterion in measuring the Constitutional power of Congress to tax has proved to be unworkable, and we reject it as a

guide in the field here involved. Cf. United States v. California, supra, 297 U.S. at pages 183–185, 56 S.Ct. 423, 424, 80 L.Ed. 567.

The State of Washington does have power to own and control the school-lands here involved and to sell the lands or the timber growing on them, subject to the limitations set out in the Enabling Act. And our only question is whether the state's power to make the sales must be in subordination to the power of Congress to fix maximum prices in order to carry on war. For reasons to which we have already adverted, an absence of federal power to fix maximum prices for state sales or to control rents charged by a state might result in depriving Congress of ability effectively to prevent the evil of inflation at which the Act was aimed. The result would be that the Constitutional grant of the power to make war would be inadequate to accomplish its full purpose. And this result would impair a prime purpose of the federal government's establishment.

To construe the Constitution as preventing this would be to read it as a self-defeating charter. It has never been so interpreted. Since the decision in McCulloch v. Maryland, 4 Wheat. 316, 420, 4 L.Ed. 579, it has seldom if ever been doubted that Congress has power in order to attain a legitimate end—that is, to accomplish the full purpose of a granted authority—to use all appropriate means plainly adapted to that end, unless inconsistent with other parts of the Constitution. And we have said, that the Tenth Amendment "does not operate as a limitation upon the powers, express or implied, delegated to the national government."

Where as here, Congress has enacted legislation authorized by its granted powers, and where at the same time, a state has a conflicting law which but for the Congressional Act would be valid, the Constitution marks the course for courts to follow. Article VI provides that "This Constitution and the Laws of the United States . . . made in Pursuance thereof . . . shall be the supreme Law of the Land . . ."

Affirmed.19

Mr. Justice Douglas would reverse the judgment for the reasons set forth in his dissenting opinion in Hulbert v. Twin Falls County, 327 U.S. 103, 66 S.Ct. 444.20

¹⁹ Footnotes omitted.

Municipal public housing is subject to federal rent control. City of Dallas v. Bowles, 152 F.2d 464 (U.S. Emerg.Ct. of App., 1945).

²⁰ He gave his reasons in dissenting in the companion case, Hulbert v. Twin Falls County, 327 U.S. 103, 66 S.Ct. 444 (1946), in which a county's sale of a used farm-type tractor was held to be subject to the Emergency Price Control Act. He said, in part: "... While Sec. 302 (h) would relieve the

OKLAHOMA CITY v. SANDERS

Circuit Court of Appeals of the United States, Tenth Circuit, 1938. 94 F.2d 323, 115 A.L.R. 363.

WILLIAMS, CIRCUIT JUDGE. This is an action brought by a contractor (appellee) engaged in the construction of a so-called low cost housing project for the United States to restrain a city and certain of its officers from attempting to enforce certain municipal ordinances in connection with such construction, and from instituting criminal prosecutions under said ordinances against said contractor for failure to comply therewith. Reference will be made to the parties as they appeared in the court below. . . .

During the month of October, 1935, the United States purchased certain land situated within the boundaries of said city for the sole purpose of constructing buildings and improvements thereon, known as a low cost housing project, pursuant to certain acts of Congress. On July 9, 1936, Horatio Hackett, acting as agent of the United States government, entered into a contract with plaintiff in which the latter obligated himself to construct all buildings and improvements on Rotary Park Housing Project H–8101 and to furnish all materials and labor necessary thereto.

Plaintiff commenced operations and construction under the contract and continued same except for delays occasioned by defendants in seeking to enforce certain municipal codes and ordinances concerning inspection and permits. Plaintiff and his employees were neither using nor operating on any land outside of the boundaries of the tracts of land purchased by the United States. In September, 1936, defendants caused plaintiff to be arrested, charged with the violation of certain municipal ordinances relating to the procurement of licenses, the giving of bonds and the submitting to inspections. He was found guilty and a fine assessed against him and defendants announced their pur-

states from the criminal sanctions of the Act, they would be subject to the treble damage provisions of Sec. 205 (3), 50 U.S.C.A. Appx. 925 (3), 11 F.C.A. title 50, Appx. 25, Sec. 205 (e), which are remedial, not punitive, in nature. Bowles v. American Stores, 78 App.D.C. 238, 240, 139 F.2d 377, 379. And the Administrator would have the power under Sec. 205 (f) (1) to require a State to get a license from him in order to sell its commodities—a license which would be subject to suspension. Sec. 205 (f) (2). These are substantial intrusions on the sovereignty of the States, involving matters of great delicacy. And they raise for me serious constitutional questions. Cf. New York v. United States, decided January 14, 1946, dissenting opinion (326 U.S. 572, ante, 265, 66 S.Ct. 310). Since the Act is at best ambiguous, I would choose the construction which avoided the constitutional issue. Only in the event that the language of the Act was explicit would I assume that Congress intended even in days of war to interfere with the traditional sovereignty of the States to the extent indicated." (Footnotes omitted).

pose to institute separate prosecutions for each and every day plaintiff continued the construction without compliance with such ordinances, and plaintiff avers that in the event he be required to comply with the requirements of the defendants, his cost of construction would increase at least \$50,000.00 and his selection of employees would be greatly limited. He asked that defendants be restrained from filing informations against him, and causing his arrest for the violation of the municipal ordinances until a hearing could be had, and that thereafter the defendants be enjoined from committing the acts of which complaint was made.

A temporary restraining order having been issued, a motion to dismiss for want of jurisdiction and on other grounds having been made and heard was overruled. On stipulated facts the case was submitted for final hearing, in which it was recited, among other things, that soon after plaintiff began the construction of the project, the authorities of said city determined that such construction and improvement was subject to certain ordinances relating to licenses, bonds, and inspections, and plaintiff declining to comply therewith on the ground that the national government had exclusive jurisdiction over such property, the officials of said city caused him to be arrested, and the municipal court found him guilty and imposed against him a fine, said officials declaring that daily arrests would be made if plaintiff continued with the work without first complying with the ordinances. A permanent injunction having been awarded, the city and its officers appeal.

Section 201(a) of title 2 of the National Industrial Recovery Act authorizes the President to create a Federal Emergency Administration of Public Works and to appoint an Administrator. Section 202 provides that the Administrator, under the direction of the President, shall prepare a comprehensive program of public works which shall include, among other things, construction, reconstruction, alteration or repair under public regulation or control of low-cost housing and slum-clearance projects. Section 203 authorizes (a) the construction of any public works project included in the program prepared by the Administrator in accordance with the previous section, and (b) the acquisition by purchase or the exercise of the power of eminent domain of any real or personal property in connection with any such project. Stat. 200, 40 U.S.C.A. §§ 401(a), 402, 403. The land described in the bill was acquired and the project authorized under the terms of said statute.

By article 1, section 8, clause 17 of the Constitution of the United States, it is provided that the Congress shall have exclusive power to legislate in relation to property purchased by the United States with the consent of the state in which such property is located.

By section 10053 of Oklahoma Statutes 1931, 80 Okl.St.Ann. Sec. 1: "The consent of the State of Oklahoma is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation or otherwise, of any land in this State required for sites . . . for needful public buildings or for any other purposes for the government."

By section 10054, 80 Okl.St.Ann. Sec. 2: "Exclusive jurisdiction in and over any lands so acquired by the United States shall be, and the same is hereby ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this State; but the jurisdiction so ceded shall continue no longer than the United States shall own such lands." . . .

The Congress of the United States has declared such a low-cost housing and slum-clearance project to be a public use, authorizing the acquisition of lands for such purpose, either by purchase or the exercise of the power of eminent domain. Through such a project elimination of unsanitary and unhealthy conditions is brought about by clearing such premises of such buildings, and removing the degraded and unwholesome conditions existing in such surroundings, pertaining to home-life in cities, thereby preventing illness, disease, and crime, and aiding and benefiting the health, morals, and safety of the community. It may be that some parts of the nation may not immediately feel the benefits of such activity, but the increasing of employment and stimulation of industry, and reducing illness, disease, and crime, has a beneficial effect upon the nation as a whole and promotes the public welfare.

Under our federal system, the municipal or state police power having been lodged and reserved in the state, a corresponding power in appropriate cases naturally arises under the general welfare provision contained in the Federal Constitution, article 1, § 8, cl. 1.

Though the United States lacks the police power reserved to the states by the Tenth Amendment, yet, when it exerts a power conferred on it by the Federal Constitution, it is no valid objection that such exercise may be attended by the same incidents which attend the exercise by a state of its police power, or that it may tend to accomplish a similar purpose. Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 40 S.Ct. 106, 64 L.Ed. 194, and authorities therein cited.

The cession of exclusive jurisdiction over premises acquired by the United States government, included the power of regulation and control in such matters as ordinarily fall within the police power of the state. United States v. Cornell, 2 Mason 60, 25 Fed. Cas. 646, 647, No. 14867; State of Ohio v. Thomas, 173 U.S. 276, 277, 19 S.Ct. 453, 43 L.Ed. 699; United States v. Hunt, D.C.Ariz., 19 F.2d 634; David Mark Cummings v. City of Chicago, supra; Arizona v. California, 283 U.S. 423, 51 S.Ct. 522, 75 L.Ed. 1154; Williams v. Arlington Hotel Co., 8 Cir., 22 F.2d 669; and People v. Mouse, 203 Cal. 782, 265 P. 944.

The Act of June 29, 1936, 40 U.S.C.A. § 421, does not vest in Oklahoma City the right to enforce the provisions of ordinances in question.

"The acquisition by the United States of any real property acquired before or after June 29, 1936 in connection with any low-cost housing, or slum-clearance project constructed before or after June 29, 1936 with funds allotted to the Federal Emergency Administration of Public Works pursuant to sections 401 to 411 of this title, the Emergency Relief Appropriation Act of 1935, or any other law, shall not be held to deprive any State or political subdivision thereof of its civil and criminal jurisdiction in and over such property, or to impair the civil rights under the local law of the tenants or inhabitants on such property; and insofar as any such jurisdiction has been taken away from any such State or subdivision, or any such rights have been impaired, jurisdiction over any such property is hereby ceded back to such State or subdivision. (June 29, 1936, c. 860, Sec. 1, 49 Stat. 2026.)"

Its text and the reports of the congressional committee make it reasonably certain that the purpose of the act was to authorize service of civil and criminal processes of the state upon the premises, enabling persons residing thereon to serve on juries in the state courts, and to vote in elections held under the state law and to otherwise exercise the rights of citizens of the state. It was not the purpose that the state should have the right to exert police power there through application of municipal ordinances relating to licenses, bonds, and inspections in the course of construction thereon of buildings by the United States government, no such legislative intent or desire being indicated by the act.

The report of House Ways and Means Committee (H.R. 2660) is in part as follows:

"The Housing Division of the Federal Emergency Administration of Public Works, pursuant to the provisions of Title II of the National Emergency Relief Act, the Emergency Appropriations Act of 1935, has constructed and is proposing to construct low-cost housing and slum-clearance projects in numerous cities

through the United States. In order to execute this housing program effectively, amendatory legislation is necessary.

"Legal representatives of various municipalities interested in such projects have contended that, under the Constitution of the United States and the cession laws of the various states, the United States acquires exclusive jurisdiction over the property embraced in such projects whether or not such contention is sound, it is thought advisable to remove doubts and hesitancy arising because of such contentions, by waiving exclusive jurisdiction of the United States insofar as it may arise by reason of ownership by the United States of the sites of such projects. Otherwise, doubts as to the rights of tenants to vote, to send their children to local schools, and to exercise other civil rights under the local laws keep prospective tenants from taking advantage of such projects."

On October 3, 1936, the Director, Legal Division, Federal Emergency Administration of Public Works, Washington, D. C., transmitted to the Director of Housing a well-considered opinion in which analysis of the facts in the instant case is made and concludes with the following: "I am, therefore, of the opinion that the state or local government may not supervise the work of a contractor performing work on property owned by the United States of (sic) a contract with the United States."

The part of the opinion just quoted refers to the contract between the appellee (plaintiff) and the government for the construction of the improvements known as Project H-8101.

As was said in Six Cos. Inc. v. De Vinney, D.C., 2 F.Supp. 693, 697: "Statutes relinquishing jurisdiction are strictly construed. A controlling reason for such construction is that it is a matter of the very greatest importance to both the national and the state governments affected. Larson v. South Dakota, 278 U.S. 429, 49 S.Ct. 196, 73 L.Ed. 441."

Any attempt on the part of the general government to cede to the state the former's jurisdiction over the property here in question should be closely and strictly construed and great care should be taken that only the exact legislative intent should be followed. The act in question was merely a recognition on the part of Congress that the state had retained certain control, as stated in section 10054, and that there was no attempt to recede complete and general jurisdiction. Such a contention is untenable in the light of 40 U.S.C.A. Sec. 255, which requires: "No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any * * customhouse * * or other public building of any kind whatever, * * until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given."

By section 10054, O.S.1931, 80 Okl.St.Ann. Sec. 2, Oklahoma ceded to the general government "exclusive jurisdiction in and over any lands" acquired by the United States for one or more of the purposes specifically named in section 10053, 80 Okl.St.Ann. Sec. 1, supra, and, "for any other purposes for the government," but retained, however, by the language of section 10054 jurisdiction for "the service upon such sites of all civil and criminal process of the courts of this State," etc.

The decree of the lower court should be, and is, affirmed.

The same result has been reached as to federal construction of permanent buildings under the Lanham Act for wartime housing. United States v. City of Philadelphia, 56 F.Supp. 862 (D.C., E.D. Pa., 1944), affirmed 147 F.2d 291 (C.C.A.3rd, 1945), certiorari denied 325 U.S. 870, 65 S.Ct. 1410 (1945).

In United States v. California, 297 U.S. 175, 183, 56 S.Ct. 421 (1936), the State of California, which operated a belt railroad on the San Francisco waterfront, and as such engaged in interstate and foreign commerce, had not complied with the Federal Safety Appliance Act. The Government prevailed in a suit against the state to recover the statutory penalty of \$100 for violation of the Act. Mr. Justice Stone, for the Court, said in part:

"2. The state urges that it is not subject to the Federal Safety Appliance Act. It is not denied that the omission charged would be a violation if by a privately-owned rail carrier in interstate commerce. But it is said that as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceeds of operation for harbor improvements, see Sherman v. United States, supra, Denning v. State, 123 Cal. 316, 55 P. 1000, it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the Federal Act. In any case it is argued that the statute is not to be construed as applying to the state acting in that capacity.

"Despite reliance upon the point both by the government and the state, we think it unimportant to say whether the state conducts its railroad in its "sovereign" or in its "private" capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. See Puget Sound Power & Light Co. v. Seattle, 291 U.S. 619, 624, 54 S.Ct. 542; Green v. Frazier, 253 U.S. 233, 40 S.Ct. 499; Jones v. Portland, 245 U.S. 217, 38 S.Ct. 112. The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has

been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. The power of a state to fix intrastate railroad rates must yield to the power of the national government when their regulation is appropriate to the regulation of interstate commerce. United States v. Louisiana, 290 U.S. 70, 74, 75, 54 S.Ct. 28; Wisconsin Railroad Comm'n v. Chicago, B. & Q. R. Co., 257 U.S. 563, 42 S.Ct. 232; Shreveport Rate Cases, 234 U.S. 342, 34 S.Ct. 833. A contract between a state and a rail carrier fixing intrastate rates is subject to regulation and control by Congress, acting within the commerce clause, New York v. United States, 257 U.S. 591, 42 S.Ct. 239, as are state agencies created to effect a public purpose, see Sanitary District of Chicago v. United States, 266 U.S. 405, 45 S.Ct. 176; Board of Trustees v. United States, 289 U.S. 48, 53 S.Ct. 509; see Georgia v. Chattanooga, 264 U.S. 472, 44 S.Ct. 369. In each case the power of the state is subordinate to the constitutional exercise of the granted federal power.

"The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power, see Metcalf & Eddy v. Mitchell, 269 U.S. 514, 522–524, 46 S.Ct. 172, which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it. Helvering v. Powers, 293 U.S. 214, 225, 55 S.Ct. 171; Ohio v. Helvering, 292 U.S. 360, 54 S.Ct. 725; South Carolina v. United States, 199 U.S. 437, 26 S.Ct. 110; see Murray v. Wilson Distilling Co., 213 U.S. 151, 173, 29 S.Ct. 458, explaining South Carolina v. United States, supra. Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. state can no more deny the power if its exercise has been authorized by Congress than can an individual."

The federal commerce power likewise extends to state and municipal operation of radio broadcasting stations, City of New York v. Federal Radio Commission, 59 App.D.C. 129, 36 F.2d 115 (App. D.C., 1929), certiorari denied 281 U.S. 729, 50 S.Ct. 246 (1930); and to the bridging or obstructing by state and local units of waters, which are under federal jurisdiction by reason of their actual or potential navigability. This does not mean that a local unit

can accept every condition a cognizant federal authority sees fit to stipulate. That will depend ultimately upon the powers which have been or could be devolved upon the unit by the state. Theoretically, it may be that federal authority to exact conditions would leave off where the conditions called for abdication of state power but nothing like precision of application can be attained since resort may be had to two separate systems of courts for consideration of the state and federal aspects of the problem. See McGuinn v. City of High Point, 217 N.C. 449, 8 S.E.2d 462, 128 A.L.R. 608 (1940).

As to state regulation of motor vehicle operation on state roads by federal employees in the performance of their duties, see Johnson v. Maryland, 254 U.S. 51, 41 S.Ct. 16 (1920).

Federal condemnation of state or local property devoted to a public use and the converse situation may present difficult conflicts of authority. There is a recent instance of federal taking for use as an Indian reservation of a large tract held by the State of Minnesota for reforestation, wild life propagation and protection and hunting. Congress had expressly authorized the condemnation of public lands. The balancing of the federal and state interests was deemed a legislative problem. State of Minnesota v. United States, 125 F.2d 636 (C.C.A.8th, 1942).

The General Condemnation Act (25 Stat. 357, 40 U.S.C.A. § 257) and the Public Buildings Act (44 Stat. 630-631, 53 Stat. 1426–1427, 40 U.S.C.A. § 341) authorize the taking of real estate by eminent domain for the erection of public buildings and other public uses. The former authorizes a federal officer, who has been empowered to procure real estate for such purposes to resort to eminent domain when, in his opinion, it was necessary or advantageous to the Government. The latter authorizes the Federal Works Administrator to acquire by purchase, condemnation or otherwise such sites as he may deem necessary. Neither act refers to the condemnation of particular property or land in particular communities. The Government relied on these statutes in seeking to condemn for post office purposes land in Cape Girardeau, Missouri, held by the City under a dedication to park purposes. The condemnation would result in the removal of a city hall and county court house from the land taken but the city and county did not oppose the taking. An heir of the dedicators was the only contestant. The Circuit Court of Appeals thought the general grants of authority in the statutes invoked not enough to cover a taking of land devoted to local governmental uses in keeping with a dedication to such uses. The Supreme Court, in reversing, made it plain that federal power to take for federal public uses was supreme over state and local as well as private purposes and found no limitation in the statutes upon the choice

of sites. United States v. Carmack, 329 U.S. 230, 834, 67 S.Ct. 252 (1946). Mr. Justice Douglas concurred, but he reserved judgment as to the circumstances under which power to take state or city land under a general condemnation act should be implied where the state or city opposed the taking.

Here again state and local governments are in an uneven position with the United States, since the United States Supreme Court has made it clear that under Art. IV, Section 3, clause 2 of the Constitution Congressional control of the disposition of the public lands is exclusive and only through its exercise in some way can rights in such lands be acquired. Utah Power and Light Company v. United States, 243 U.S. 389, 37 S.Ct. 387 (1917).

B. NATIONAL POLICY AND LOCAL GOVERNMENT

Preliminary reference has already been made in Chapter 1 to federal use of economic leverage to influence state or local governmental action. The device has been employed for nearly a century but it remained for the administration of President Franklin D. Roosevelt to make use of it on a huge scale. Regular grants-in-aid and distributions of shared revenues now run in excess of \$1,000,000,000 per year. The Book of the States 1948-49, 60-61 (The Council of State Gov'ts, 1948). In order to take advantage of federal financial assistance a large body of state enabling legislation and some constitutional amendments have been adopted. These measures have related both to structure and powers. New types of ad hoc agencies have been created, additional substantive powers granted and express authority to cooperate with the Federal Government conferred. On its part, the United States has resorted both to loans and grants-in-aid of a great variety of public improvements, which involved capital outlay, and to grants-in-aid of continuing services.

Appropriations payable from the General Fund of the Treasury, however illegal, would not, of course, affect the validity of taxes which fed that fund. Dedicated revenues were involved in United States v. Butler, 297 U.S. 1, 56 S.Ct. 312 (1936). It is common learning, moreover, that one who is a federal taxpayer does not have an immediate enough interest to challenge the legality of an appropriation. Frothingham v. Mellon, 262 U.S. 447, 43 S.Ct. 597 (1923). Nor can a power company or other governmental unit, challenge the legality of federal financial assistance to the project. Alabama Power Co. v. Ickes, 302 U.S. 464, 58 S.Ct. 300 (1938); Duke Power Co. v. Greenwood County, 302 U.S. 485, 58 S.Ct. 306 (1938). On the other hand, if the challenger, say, a power company with a non-exclusive franchise, can find

some flaw, as a matter of state law, it may have standing to complain either as one seeking to prevent unlawful competition or as a local taxpayer attacking the illegal expenditure of public funds.

MEMPHIS POWER & LIGHT COMPANY v. CITY OF MEMPHIS

Supreme Court of Tennessee, 1937. 172 Tenn. 346, 112 S.W.2d 817.

MCKINNEY, JUSTICE. The bill seeks to enjoin the defendants from proceeding with a contract already entered into with the

Tennessee Valley Authority (hereinafter referred to as TVA) and a contract about to be entered into with the Federal Public Works Administration (hereinafter called PWA), upon the ground that such contracts violate certain provisions of the State and Federal Constitutions. The cause was heard by both chancellors in Memphis, who sustained a demurrer to the bill and dismissed it.

Complainant holds a nonexclusive franchise granted by the city of Memphis for the distribution of electric current in that city.

The defendants are the city of Memphis, its mayor and board of commissioners (its governing body), and the Memphis Light & Water Division of said city and its commissioners.

The question of a \$9,000,000 bond issue for the construction or acquisition of a municipal plant for the distribution of TVA power was submitted to the voters of Memphis at an election held on November 6, 1934, and by the overwhelming vote of 32,735 to 1868 the electorate favored the bond issue.

By chapter 616 of the Private Acts of 1935 the Memphis Light and Water Division, and its governing board of commissioners, were created. Section 3 of said act provides as follows:

"Said Board of Light and Water Commissioners shall have the power and authority to purchase electric current from the Tennessee Valley Authority or from any other person, firm or corporation as in the judgment of said Board of Light and Water Commissioners shall be proper or expedient, and to make any and all contracts necessary and incident to carry out this purpose," etc.

And by section 7 it is further provided:

"That the Light and Water Commissioners shall have the right to make any and all contracts necessary or convenient for the full exercise of the powers herein granted, including, but not limited to, (a) contracts with any person, federal agency, or municipality for the purchase or sale of energy, and (b) contracts with any person, federal agency, or municipality for the acquisition of all or any part of any system or systems; and in connection with any such contract, notwithstanding any provision of this or any other Act, the Light and Water Commissioners shall have power to stipulate and agree to such covenants, terms and conditions as the Board may deem appropriate, including, but without limitation, covenants, terms and conditions with respect to the resale rates, financial and accounting methods, services, operation and maintenance practices, and the manner of disposing of the revenues of the system or systems conducted and operated by the Commission," etc.

By virtue of the authority thus conferred upon it, the city, on November 23, 1935, entered into a written contract with TVA for the purchase of electric power for a period of twenty years at a stipulated rate, the reasonableness of which is not questioned. The right of TVA to dispose of its electric energy is fully sustained by the following decisions of the Supreme Court of the United States: Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 56 S.Ct. 466, 472, 80 L.Ed. 688; Arizona v. California, 283 U.S. 423, 51 S.Ct. 522, 75 L.Ed. 1154; United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 33 S.Ct. 667, 57 L.Ed. 1063; Utah Power & Light Co. v. Pfost, 286 U.S. 165, 52 S.Ct. 548, 76 L.Ed. 1038; Green Bay & M. Canal Co. v. Patten Paper Co., 172 U.S. 58, 19 S.Ct. 97, 43 L.Ed. 364.

The power to purchase such electric energy is clearly authorized by the provisions of the legislative act quoted above.

The primary insistence of complainant is that the contract of the city with TVA confers governmental powers upon the latter by delegating to it authority to fix resale rates in violation of article 2, § 3, of the State Constitution, which is as follows:

"The Legislative authority of this State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives, both dependent on the people, who shall hold their offices for two years from the day of the general election."

It will be observed that the foregoing section says nothing about rate making as to utilities, is not specific nor self-executing, but is necessarily subject to judicial construction. Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481.

The provisions of the contract which complainant assails are as follows:

"6. Resale Rates: In order to facilitate the disposition of surplus power generated by Authority and not needed by it in its operations, and in order to carry out the intention of Congress to encourage the more abundant use of electricity throughout

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the area in which Board operates, Board agrees to charge consumers the rates set forth for the several classes thereof in Schedule B-1 to B-5A, inclusive, of the said Schedule of Rates and Charges and not to depart therefrom except by agreement of Board and Authority. Additional resale schedule for special classes of consumers or special uses of electricity may be added from time to time by agreement of Board and Authority. If it should appear that the rates provided for in said resale schedule with the surcharge provided for therein do not produce revenue sufficient to operate and maintain Board's electric system on a self-supporting and financially sound basis, as provided by chapter 616 of the Private Acts of Tennessee for 1935, then Board shall, by agreement with Authority, prescribe and enforce such changes in rates as will provide for the increased revenues necessary to place the system upon such a self-supporting and financially sound basis.

- "7. Disposition of Board's Revenues: Board deeming it necessary for the purposes of this contract, and for the purpose of providing reasonable rates for electric service pursuant to this contract and to the law, agrees to dispose of its gross revenues from electric operations in the following manner:
- "(a) Revenues shall first be used for the payment of all current operating expenses, including, without limitation, salaries, wages, cost of materials and supplies, power at wholesale and insurance.
- "(b) From remaining revenues Board shall next currently provide for the payment at maturity of interest accrued on all bonds or other indebtedness applicable to Board's electric system, and for amortization charges on all such bonds or other indebtedness and/or sinking fund payments thereon.
- "(c) Thereafter revenues shall be used currently to set up reasonable reserves for replacements, new construction and for contingencies, and to provide a reasonable amount of cash working capital.
- "(d) From remaining revenues Board shall thereafter pay into the General Fund of Municipality a return on its investment and a tax equivalent as provided in the Financial and Accounting Policy in the Schedule of Terms and Conditions of Contract attached hereto.
- "(e) All remaining revenues shall be considered surplus revenues and may be devoted by Board to the purchase or retirement of bonds or other indebtedness before maturity, and if not so devoted shall serve as the basis for the reduction or elimination of surcharges to consumers, and thereafter for the reduction of rates.

"Surplus revenues shall be computed as of December 31, and June 30, of each year." . . .

Complainant predicates its attack upon the false premise that a municipality, in constructing and operating an electric lighting plant, is engaging in a governmental function, whereas the almost universal rule is that in so doing it acts in a private or business capacity. . . .

It is unnecessary for us to decide as to the jurisdiction of the Railroad and Public Utilities Commission, a question as to which the authorities are in great conflict, as will be noted in the annotation in 76 A.L.R. 851–855, for the reason that the Legislature, by chapter 42, Pub.Acts 1935, has expressly exempted municipal corporations from the jurisdiction of the Railroad and Public Utilities Commission in this state.

But as to all public utilities, whether owned by private interests or municipal corporations, the power to fix rates rests primarily with the state, but may be delegated to the municipality. 43 C.J. 421–424. In the instant cause such power was delegated to the city, and it has exercised the authority so conferred upon it and has not, in our opinion, delegated the making of resale rates to TVA. We are unwilling to give the constitutional provision involved such a narrow construction as would result in the destruction of this contract which has the approval of the state, the municipality, and the patrons and taxpayers affected thereby. The legislative act confers upon the city the power to contract with TVA "without limitation," and upon such "covenants, terms and conditions with respect to the resale rates, financial and accounting methods, services, operation and maintenance practices, and the manner of disposing of the revenues," etc., as it deems appropriate. The TVA is a public instrumentality and holds the electric energy generated at its dams in trust for the people of the whole country. United States v. Beebe, 127 U.S. 338, 8 S.Ct. 1083, 32 L.Ed. 121; United States v. Trinidad Coal Co., 137 U.S. 160, 161, 11 S.Ct. 57, 34 L.Ed. 640; Camfield v. United States, 167 U.S. 518, 17 S.Ct. 864, 42 L.Ed. 260; Causey v. United States, 240 U.S. 399, 36 S.Ct. 365, 60 L.Ed. 711.

One of the objects of TVA is to supply the inhabitants within its territory with cheap electric current. It does not operate for profit. The contract which it has entered into with the city is predicated upon reasonable rates, and there can be little doubt but that in order to effectuate the purpose to protect the public against unjust charges, it reserved the right to approve any increase in rates. There is no provision in the contract authorizing TVA either to increase or reduce the rates agreed upon. The reserved right to approve any increase in charges is a merely supervisory privilege that must be exercised reasonably and not

arbitrarily, and, being a servant of the general public, it is presumed that in exercising this right it will conform to the spirit of the contract. Lummus Cotton Gin Co. v. Arnold, 151 Tenn. 540, 269 S.W. 706; Dunlap v. Sawvel, 142 Tenn. 696, 223 S.W. 142. But the regulation of rates, however accomplished, is subject to the continuing police power of the state. Lewis v. Nashville Gas & Heating Co., supra.

Assume, for argument, that the city had fixed the rates stipulated in the contract, as it was authorized to do, which were satisfactory to TVA, and that the contract had thereupon been entered into without any provision as to changing rates during the contract period. That would be a valid contract, and would afford no basis for a contention that the city had delegated its rate-making authority to TVA. If such a contract is valid, then it could not be rendered invalid by adding a clause authorizing an increase of rates, with the approval of TVA, if changed conditions should warrant it. That would be but an added privilege for the protection of the city which it did not otherwise possess.

As to the other provisions of the contract relative to an accounting system and the disposition of revenue received for current, we find no constitutional infraction. Those stipulations are both reasonable and commendable, and were expressly authorized by the Legislature. Such a large institution functioning for the benefit of the public should keep and maintain an adequate bookkeeping system. Without such a system it would be impossible for TVA, or other interested parties, to ascertain the condition of the plant, whether it was being properly managed, and whether the rates exacted were reasonable and just.

The most salutary feature in the contract is that with respect to the disposition of revenue received. It not only makes the plant self-sustaining and provides for liquidating its indebtedness, but it prevents the city from diverting the revenue received for current to other purposes.

The proposed contract with PWA, by which the city is to obtain a long-time loan at a low rate of interest, is attacked upon substantially the same grounds as those interposed to the contract between the city and TVA. The authority for this contract is found in chapter 108, § 2, Private Acts of 1935, Extra Session, and is as follows:

"To make contracts and execute instruments containing such terms, provisions and conditions as in the discretion of the governing body of the municipality may be necessary, proper or advisable for the purpose of obtaining a grant, loan or other financial assistance from any Federal Agency pursuant to or by

virtue of the Recovery Act" (defined in section 1 to include NIRA and the Emergency Relief Appropriation Act of 1935); "and to carry out and perform the terms and conditions of all such contracts or instruments."

The provisions of the proposed PWA contract, which complainant insists would make the act invalid, are as follows:

- "(1) That no convict labor shall be employed on the project.
- "(2) Except in executive, administrative and supervisory positions, so far as practicable and feasible, no individual shall be permitted to work more than eight hours in one day, or more than thirty hours in any one week.
- "(3) That the city shall predetermine minimum wage rates in accordance with customary local rates for all trades and occupations employed on the project and incorporate them in the appropriate contract documents, which shall be compensation sufficient to provide for the hours of labor as limited and a standard of living in decency and comfort.
- "(4) In the employment of labor in connection with the project, preference shall be given, first, to ex-service men with dependents, next, to citizens of the United States and aliens who have declared intention to become citizens, residents of the place where the work is located; next, to citizens of the United States and aliens who have declared intention to become citizens, residents of the state, territory and district where the work is located, provided such labor is available and qualified for the work.
- "(5) That the maximum human labor should be used in lieu of machinery where practicable and consistent with sound economy and public advantage.
 - "(6) Employees shall have the right of collective bargaining."

We are of the opinion that under the authority of the Legislature, which we have set out above, the city had a right to make this contract, and, functioning as a private corporation, the question of delegation of power is not pertinent. But in no event can we see wherein the city has delegated any of its powers to PWA, even though they be treated as legislative. It is a matter of public knowledge that this is one of the agencies of the United States created for the purpose of relieving unemployment, and the provisions here complained of were designed with that end in view: and so far as we can discern they are both reasonable and beneficial for all parties concerned. By conforming to these requirements the city obtains the funds with which to construct its plant on better terms than it could procure them elsewhere, makes a contribution to the relief of unemployment, and aids the Nation in its effort to recover from the economic depression that has caused so much mental and physical suffering.

The Legislature conferred upon the city a very wide discretion in agreeing to such terms and conditions as it deemed advisable in order to obtain a loan from PWA with which to construct its plant. Pursuant to such authority the city can contract with respect to wages, hours of labor, etc., without violating any of the laws of this state. Such conditions, being agreed upon in advance, become fixed, and are not subject to the whim and caprice of PWA. This is not a case where the lender reserves the right to control wages, hours of labor, etc., as the work progresses. The power of the state and the municipalities to enter into such contracts seems to be well sustained by the authorities. Heim v. McCall, 239 U.S. 175, 36 S.Ct. 78, 60 L.Ed. 206, Ann.Cas.1917B, 287; Ellis v. United States, 206 U.S. 246, 27 S.Ct. 600, 51 L.Ed. 1047, 11 Ann.Cas. 589; Atkin v. Kansas, 191 U.S. 207, 24 S.Ct. 124, 48 L.Ed. 148, affirming 64 Kan. 174, 67 P. 519, 97 Am.St.Rep. 343; People v. Crane, 214 N.Y. 154, 108 N.E. 427, L.R.A.1916D, 550, Ann.Cas. 1915B, 1254, affirmed in 239 U.S. 195, 36 S.Ct. 85, 60 L.Ed. 218; Doyle v. People, 207 Ill. 75, 69 N.E. 639; Hamilton v. People, 194 Ill. 133, 62 N.E. 533; Woods v. Woburn, 220 Mass. 416, 107 N.E. 985, Ann.Cas.1917A, 492; Wagner v. Milwaukee, 180 Wis. 640, 192 N.W. 994; McQuillin on Municipal Corporations, 2d Ed., §§ 1080, 1302, 2057.

Finding no error in the decree of the chancellors, it results that it must be affirmed.

In a later case involving a similar TVA contract but no express authority to make it the Court of Appeals of Kentucky determined that the contract was ultra vires. City of Middlesboro v. Kentucky Utilities Co., 284 Ky. 833, 146 S.W.2d 48 (1940).

A like result had been reached in the Eighth Circuit in 1935 as to a city contract with PWA governing construction and operation of a city power project with the aid of a PWA loan and grant. The loan agreement in that case gave to PWA continuing control over certain aspects of construction. The court declared this to be an unauthorized abdication of local authority over the project. Arkansas-Missouri Power Co. v. City of Kennett, 78 F.2d 911 (C.C.A.8th, 1935). And see Arkansas-Missouri Power Co. v. City of Kennett, 348 Mo. 1108, 156 S.W.2d 913 (1941). Thereafter PWA so changed its forms of agreements as to fix definitely by contract the terms and conditions governing construction of the project and to eliminate continuing control. Such an agreement was promptly upheld in the Greenwood County litigation. Greenwood County, S.C., v. Duke

Power Co., 81 F.2d 986 (C.C.A. 4th, 1936). The printed Terms and Conditions embodied in later PWA grant and loan and grant agreements contained the following paragraph:

"Anything in the Offer or the terms and conditions to the contrary notwithstanding, nothing herein shall require the Applicant to observe or enforce compliance with any provision hereof, perform any other act or do any other thing in contravention of any applicable State or Territorial law: Provided, That if any of the provisions of the Offer or the terms and conditions violates any State or Territorial law, or if compliance with the provisions of the Offer or the terms and conditions would require the Applicant to violate any State or Territorial law, or if because of any other reason the Applicant cannot comply with any of such provisions, the Applicant will at once notify the Administrator in writing in order that appropriate changes and modifications may be made by the Administrator and the Applicant to the end that the Applicant may proceed as soon as possible with the construction of the Project." (PWA Form No. 230, Terms and Conditions, September 15, 1937).

Where the United States proceeds by constructing a public facility and then leasing it to a local agency the problem of standing to raise questions of federal power is simpler. The constitutionality of the United States Housing Act of September 1, 1937, was raised in a case involving the amenability of a federal housing project, leased to an Ohio public agency, to local taxation. The Act expressly exempted the property of the Federal Public Housing Authority from all taxation. Congressional power was upheld in a terse opinion, which clearly sustained federal power under the general welfare clause to employ federal funds and credits ". . . to assist the States and their political subdivisions to relieve unemployment and safeguard health, safety and morals of the Nation's citizens by improving housing conditions." City of Cleveland v. United States, 323 U.S. 329, 65 S.Ct. 280 (1945).

The Public Works Administration pursued the policy of stipulating an unvarying interest rate of four per centum upon all loans. Applicants were free to issue bonds through ordinary market channels on those or better terms if actually able to do so. The well-understood result was that the Government did not get the best risks. The agency, as a matter of policy, displayed a special interest in public projects for electric power development. Perhaps these two factors help to explain the recent action of Congress in authorizing the Administrator of the Federal Works Agency to reduce to $2\frac{1}{2}$ per centum the rate of interest on all "power bonds" held by FWA and which were issued by States or state or local agencies for power projects financed by

the PWA. Public Law 573, Sec. 6, 79th Congress, Second Session. This may prove to be a neat way of avoiding laborious and expensive refunding operations. The difficulty is that interest rates form but one of many factors affecting debt readjustments. That is conspicuously true of the large revenue bond issues, supported by detailed security provisions, which are affected by the cited statute.

Section 121 of the Legislative Reorganization Act of 1946 (60 Stat. 812, 825) amends Rule XI of the House of Representatives to provide, among other things, that the Committee on Expenditures in the Executive Department shall have the duty of "studying intergovernmental relationships between the United States and the States and municipalities. . . ."

Chapter 3

LEGAL ASPECTS OF ORIGINAL ORGANIZATION AND CHANGES

In the two previous chapters stress has been laid upon policy considerations bearing upon the organization of local government. The object of this chapter is to develop, by selective treatment, the technical aspects of the subject.

SECTION 1. ORGANIZATION

A. COUNTIES AND TOWNSHIPS

The entire United States is divided into county areas for at least a minimum of governmental purposes, but, as previously indicated, the five Rhode Island counties have no governing bodies and are not really units of local government, and in South Dakota there are five counties which have been laid out but not formally organized. William Anderson, The Units of Government in the United States, 19 et seq. (Pub. Admin. Serv. Pub. No. 83, rev. ed. 1945). In some of the western states counties embrace huge sparsely settled areas. In many states, however, the carving out of counties has been overdone. The increased burdens of local government and contemporary means of communication and transport have, moreover, "shrunk" the old county unit. There has been much talk of consolidation but practically few consolidations have as yet been achieved. Anderson, op. cit. supra, at 5.

Constitutional provisions fixing a minimum area for a new county and forbidding the diminution of an existing county below a stated minimum by the creation of a new one exist in some states. Population minima may also be set. The Tennessee Constitution, Article X, Section 4, prescribes the very modest figures—275 square miles of area and 700 qualified voters—for a new county. Reduction of an old county below 500 square miles is forbidden. In Louisiana a new parish must have at least 625 square miles and 7000 inhabitants, nor may an old one be reduced below those figures. La.Const. of 1921, Art. XIV, § 1. The Ohio minimum is 400 square miles. Ohio Const. Art. II, § 30.

The creation of a new county out of one or more old ones involves a number of problems which should be rather specifically regulated by positive law. They include distribution of the debt burden of the old units, allocation of capital and current assets,

disposition of records (e. g.—title records), status of official personnel and operation of ordinances or other local by-laws. Several of these matters are nicely illustrated in the case of Henrico County v. City of Richmond, 177 Va. 754, 15 S.E.2d 309 (1941), set out infra. (Municipal annexation of additional territory in that case was not unlike the taking of part of a county to form a new one since, in Virginia, a city is an island in a county and no part of it.)

If the legislature does not discharge its responsibility to regulate the division of county property, and related matters, the courts have to make the best of it. They are inclined to leave the old units saddled with their entire debt burden and apportion property in accordance with its physical location. The best known case is Laramie County v. Albany County, 92 U.S. 307, 23 L.Ed. 552 (1875).

B. MUNICIPALITIES

While new special charters for established municipalities are quite common in jurisdictions like North Carolina and Tennessee, where there is no applicable constitutional limitation, original incorporation by special law is largely a thing of the past. Incorporation under general law is usually a rather simple process initiated by petition and concluded by determination by an executive or judicial officer or by a county governing body that the statutory requirements have been met. In Louisiana the governor makes the determination. The responsibility is more commonly placed on the courts. This general type of statute makes no provision for consideration in each particular case of the compatibility of the proposed incorporation with the general interests of the community. The Illinois statute is illustrative.

Ill.Rev.Stat., c. 24, § 2-5 (1945).

"Whenever any area of contiguous territory, not exceeding four square miles, and not already included within the corporate limits of any municipality, has residing thereon a population of not less than one thousand, it may be incorporated as a city as follows:

"Any fifty electors residing within the area may file with the county clerk of the county in which the area is situated, a petition addressed to the judge of the county court. The petition

¹ In that state incorporation proceedings are subject to judicial review in a statutory proceeding akin to quo warranto and the courts will go back of the governor's determination of the sufficiency of the petition. (The petition is of prime importance; it must be signed by two-thirds of the resident electors and no election is required.) State ex rel. Galloway, Dist.Atty., v. Roberts, 200 La. 36, 7 So.2d 607 (1942).

shall set forth (1) a definite description of the lands intended to be embraced in the proposed city, (2) the number of inhabitants residing therein, (3) the name of the proposed city, and (4) a prayer that a question be submitted to the electors residing within the limits of the proposed city, whether they will incorporate as a city under this Act. Upon the filing of the petition with the county clerk, it is the duty of the judge of the county court (1) to fix a time and place, within the limits of the proposed city, at which an election shall be held to determine this question, (2) to name the persons to act as judges in holding the election, and (3) to give notice of the election by causing ten notices to be posted in public places within the proposed city.

"The ballots to be used in the election shall be in substantially the following form:

Shall the territory (here describe it) be	Yes	
incorporated as a city under the general law?	No	

"The returns of the election shall be made to and canvassed by the judge of the county court and any two justices of the peace whom he shall call to his assistance. The result of the election shall be entered upon the records of the county court. If a majority of the votes cast at the election favor incorporation as a city under the general law, the inhabitants of the territory described in the petition are incorporated as a city under this Act, with the name stated in the petition." (Section 2–7 imposes upon the county judge the responsibility of calling and supervising the first election of municipal officers.)

The procedure in Virginia, by contrast, involves an inquiry by the circuit court into the merits of the particular incorporation. The court must be satisfied that it will be to the interest of the inhabitants of the town and that the general good of the community will be promoted. Va.Code § 2882 (Michie, 1942). The Supreme Court of Appeals long since decided that the statute did not embody an unconstitutional devolution of non-judicial business upon the courts. Board of Sup'rs of Norfolk County v. Duke, 113 Va. 94, 73 S.E. 456 (1912). In Bennett v. Garrett, 132 Va. 397, 112 S.E. 772 (1922), incorporation was denied because it would be prejudicial to the general good of the community affected as distinguished from the interests of the inhabitants of the area to be incorporated.

In a number of states such employment of the courts has been declared invalid as a delegation of legislative power to the judiciary. The problem is the same whether the case be one of original incorporation or change of boundaries. There is a collection of cases in Note 69 A.L.R. 266 (1930). If the court is given no discretion as to policy but is relegated to the business of determining whether specific statutory requirements have been met there is patently no problem. If, however, at the other extreme, there is broad judicial discretion as to whether the proposed action would be in the public interest, judicial antipathy to the scheme is to be expected.

Since it is not perceived that the question whether a particular incorporation or boundary change would be in the public interest could be effectively decided by mechanical application of a legislative rule of thumb the problem could be met by resort to the stock device of regulatory legislation-delegation of discretion to an administrative officer or agency in terms clear enough to provide guidance and to enable the courts to determine whether the delegate is staying within the grant. As a matter of fact, in a Nebraska special function unit case, one ground for striking down the enabling statute was that the procedure of initiating incorporation by petition of property owners and of determining the matter by popular election did not provide for determination by competent authority of the question whether incorporation would further the public welfare. Elliott v. Wille, 112 Neb. 78, 198 N.W. 861, 200 N.W. 347 (1924). The court, in effect, treated the general statutory determination that the incorporation would be in the public interest as insufficient. The legislature took the cue and passed an act placing the discretion in the courts. That measure met its fate on the shoals of separation of powers. Searle v. Yensen, 118 Neb. 835, 226 N.W. 464 (1929). In such a situation, if incorporation by special law is under a constitutional ban the only recourse left is delegation of the appropriate discretion to an administrative officer or agency or to a general function unit local governing body.

The need for some effective method of relating a particular incorporation to the broader interests of the general community is graphically presented in a now familiar setting—the urban periphery. For various reasons, sufficient unto them, the people of a residential suburb of a city may desire to remain outside the city. If annexation is easy in the particular state, one way of combating it is to constitute the suburb a separate municipality. In Texas it has proved, not unexpectedly, to be a matter of who draws more quickly. The rule is that the time of initiation of annexation or incorporation proceedings governs without regard to which was first completed. For this purpose, moreover, it has been held that the mere adoption of a resolution of intention to call a special election submitting a home rule charter amendment for annexation of territory was enough to give the city ju-

risdiction. City of Forth Worth v. State ex rel. Ridglea Village, 186 S.W.2d 323 (Tex.Civ.App.1945). The rule is an obvious borrowing from the cases relating to conflicts of jurisdiction between courts. It was applied in State ex rel. Binz v. City of San Antonio, 147 S.W.2d 551 (Tex.Civ.App.1941), writ of error denied. The Supreme Court has since referred to the Binz case approvingly. City of Houston v. State ex rel. City of West University Place, 142 Tex. 190, 176 S.W.2d 928 (1944).

In the absence of a constitutional provision addressed to the subject is there any organic limitation upon the power of a legislature to incorporate territory unadapted to municipal development? See State ex rel. Landis, Atty. Gen., v. Town of Boynton Beach, 129 Fla. 528, 177 So. 327 (1937) (an act incorporating a town declared invalid as flagrant effort to incorporate wild land unadapted to municipal development).

C. SPECIAL FUNCTION UNITS

Such diversity exists in the procedures for the creation of ad hoc units that there can be no resort to typical materials. Where such units are brought into being by special legislation there is no problem for present purposes. The power to create them can be delegated to the governing bodies of general function local units. In the exceptional situation in which it is desired to create an interstate agency or a unit which will operate across an international boundary the experience in the establishment of such agencies as the Port of New York Authority and the Buffalo and Fort Erie Public Bridge Authority will furnish valuable guidance.

Procedures are materially influenced by the types of financing contemplated. The creation of an authority or other unit, which is to conduct revenue-producing operations and is to have no power to levy ad valorem taxes or special assessments, is not affected by considerations of due process of law as may be true of procedure for establishing improvement districts dependent upon such taxes or assessments. In both of these types of units the initiation of organization proceedings may be left to private individuals. That is a commonplace even as to the creation of municipalities. Where, however, the "incorporators" have carte blanche in determining whether the agency should be established without any determination by competent public authority that the public interest would be promoted, and will enjoy control without political accountability to any constituency or to any governmental authority the asserted public character of the unit is a sham. That was the substantial basis for the result in State ex rel. Jones v. Brown, 338 Mo. 448, 92 S.W.2d 718 (1936), although the court stressed the fact that initiation was by private parties. (Under the enabling statute declared invalid in that case, from three to seven persons, who were qualified voters, could by written agreement among themselves organize a corporation known as "State Highway Toll Bridge Trustees." All they had to do was file the agreement with the Secretary of State.)

FIRST SUBURBAN WATER UTILITY DIST. v. McCANLESS

Supreme Court of Tennessee, 1941. 177 Tenn. 128, 146 S.W.2d 948.

CHAMBLISS, JUSTICE. By this suit it is sought (1) to recover certain State taxes paid under protest to the defendant Commissioner, and (2) to enjoin the County Trustee from collecting taxes assessed by the Railroad and Public Utilities Commission. The Suburban Company is a "Utility District", organized under Chapter 248, Public Acts of 1937, which provides for the creation of Public Corporations to be styled "Districts", with power of perpetual succession, "for the purpose of conducting and operating a water, sewer, or fire protection system or two or more of such systems and to carry out such purpose it shall have power and authority to acquire, construct, reconstruct, improve, better, extend, consolidate, maintain and operate such system or systems within or without the district and to purchase from, and furnish, deliver and sell to, any municipality, the State, any public institution and the public, generally, any of the services authorized by this Act." Section 5.

Broad powers are conferred for the accomplishment of all proper purposes, including many powers usually enjoyed by municipal corporations, including power to sue and be sued, contract and convey, borrow and mortgage, acquire, hold and improve property, particularly such as is required for its utility services and development, also power of eminent domain, "but", as expressly provided, "without any power to levy or collect taxes." The act provides that all the expense of construction, acquisition, upkeep and operation of the system shall be provided for by (1) service charges and (2) interest bearing bonds, payable from revenue only.

The defendants by demurrer challenged the constitutionality of the Utility Act of 1937 which the Chancellor overruled and this is the sole question before us on this appeal. If this act is constitutional the District is exempt from taxation by the express terms of Section 15 of the Act. . . .

While several paragraphs are used in the demurrer and in the assignments, the questions made appear to be three. The second, third and fourth grounds challenge as unlawful a dele-

gation of power to the County Judge or Chairman of the County Court to receive and act upon a petition signed by not less than twenty-five owners of real property residing within the boundaries of any proposed district in which shall be set out the necessity for the utility service sought to be supplied, the proposed corporate name and boundaries of the district, estimate of cost and the nomination of three residents of the district for appointment as Commissioners who will form the Board to conduct the utility. Criticism is particularly directed to the clause which provides that if at a public hearing this official "finds (a) that the public convenience and necessity requires the creation of the district and (b) that the creation of the district is economically sound and desirable, he shall enter an order of the Court so finding, approving the creation of the district", etc. The insistence is that this vests too unlimited a discretion without proper definition of "public convenience and necessity" and thus goes beyond the proper power of delegation by the Legislature.

This court has recently again emphasized that a delegation of power will not be declared unconstitutional unless it clearly appears that the power delegated is purely legislative. In Holliston Mills v. McGuffin, 145 S.W.2d 1, at page 6, we quoted with approval what we had recently said in State ex rel. v. Knox County, 165 Tenn. 319, 54 S.W.2d 973, on this subject. And in that case we had quoted from the opinion of Mr. Justice Harlan in Field v. Clark, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294, as follows:

"'The true distinction,' as Judge Ranney, speaking for the supreme court of Ohio, has well said, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' Cincinnati, W. & Z. R. Co. v. Clinton County Com'rs, 1 Ohio St. (77) 88. In Moers v. Reading, 21 Pa. (188) 202, the language of the court was: 'Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.'"

In these days of constantly expanding by Congress and the legislatures of the authority of administrative bodies and representatives, what has been done here is not beyond the pale. It is true that no details are set forth for the control of the judgment of the County Judge in passing upon these applications, but, in the first place, the phrase, "the public convenience

and necessity", has come to acquire a fairly definite meaning, and, in the second place, the question whether or not the proposed district is "economically sound and desirable" is a matter which may fairly be passed upon by the official in the light of all the circumstances, surroundings and representations which will be presented to him in each case arising. It would be difficult to incorporate in the act all the matters which it may be proper for him to consider. Moreover, it appears that provision is made in the same section of the act for an appeal by petitioners who feel themselves aggrieved or prejudiced by the finding and adjudication of the County Judge to the Circuit Court. We do not feel called upon to overrule the action of the Legislature in this regard.

Complaint is also made of the provisions of the act hereinbefore mentioned for the appointment of the members of a Board of Commissioners and their successors. The original Board is appointed under Section 4 upon nomination in the petition and these serve until their successors are elected and qualified. The act provides that any vacancy shall be filled by the remaining Commissioners and that should they not agree the County Judge shall fill the vacancy. It is this last provision which appears to be particularly criticized. Counsel appear to concede that the general method of appointment was upheld by this court in Tennessee Electric Power Co. v. Chattanooga, 172 Tenn. 505, 114 S.W.2d 441, and in Board of Park Commissioners v. Nashville, 134 Tenn. 612, 185 S.W. 694, but apparently seek to distinguish these cases upon the alleged ground that no provision is made "for ouster or removal of the Commissioners." etc. The reply brief we think pertinently calls attention to the general Ouster Law, Code, Sections 1877-1899, which covers such officers. It must be borne in mind that this court has again and again recognized that our Constitution devolves upon the Legislature full power to provide for the manner of election of all officials, except in those few cases in which the Constitution has provided specific directions.

Upon review of all the assignments, we are not persuaded that any of the objections raised are sufficient to offset the strong presumption which this court properly indulges in favor of the constitutionality of every legislative enactment. The judgment of the Chancellor is affirmed and the cause will be remanded for further proceedings as to the recovery sought for taxes paid under protest. . . .

It is to be noted that the provision under attack in the McCanless case embraced the thoroughly undemocratic device of coöption, reminiscent of the old English boroughs.

In the improvement district situation, where the theory of taxes or assessments to finance improvements is apportioning burden in accordance with benefits, procedural due process requires notice to property owners and an opportunity to be heard if the determination of what property to include in the district or of the amount of benefits is left to the voters or to administrative hands. The well-known Archer County case is the leading authority. Browning v. Hooper, 269 U.S. 396, 46 S.Ct. 141 (1926). A "legislative" determination of what property is benefited, whether made by the legislature or a local governing body, exercising delegated power, on the other hand, obviates the notice and hearing requirement. Chesebro v. Los Angeles County Flood Control District, 306 U.S. 459, 59 S.Ct. 622 (1939). Myles Salt Co. v. Board of Commissioners of Iberia and St. Mary Drainage District, 239 U.S. 478, 36 S.Ct. 204 (1916). The same is true of the determination of the amount of particular benefits, if made by the legislature. Such a determination is commonly embraced in a fixed statutory rule of assessment such as area or value. Gast Realty Co. v. Schneider, 240 U.S. 55, 36 S.Ct. 254 (1916). This is probably true also where a local governing body makes the determination, although the United States Supreme Court has gone that far only as to a home rule city. Withnell v. Ruecking Construction Co., 249 U.S. 63, 39 S.Ct. 200 (1919). Even a legislative determination is subject to attack, as a matter of substantive due process, on the score of arbitrariness. Myles Salt Co. v. Board of Commissioners of Iberia and St. Mary Drainage District, 239 U.S. 478, 36 S.Ct. 204 (1916).

As a practical matter, in contrast with such financing as paving assessments determined at one time and spread against the property benefited, improvement districts commonly issue bonds supported by ad valorem taxes and the Supreme Court has not been sensitive to the charge that burden may substantially exceed benefits. Practically, again, the situation resembles that of municipal bonds supported by ad valorem taxation. Roberts v. Richland Irrigation District, 289 U.S. 71, 53 S.Ct. 519 (1933); Valley Farms Co. of Yonkers v. County of Westchester, 261 U.S. 155, 43 S.Ct. 261 (1923).

SECTION 2. CHANGES IN STRUCTURE AND POWERS

This section is included to round out the picture. Extended treatment is not indicated. The types of technical questions which arise in this area have been suggested in Chapter 2, whether the method of effecting changes in structure and powers

FORDHAM LOCAL GOV.U.C.B.-14

be by amendments to special charters, general laws applicable to all units or all those of a class, action under optional charter laws, or exercise of home rule powers.

The Optional County Government Law of New York represents the optional charter plan in a highly-developed stage and is considered justly deserving of special notice. The statute provides a choice between four standard forms of county government with many variations. The method of adopting a form of government under the Act is prescribed by Section 102, which reads as follows:

Section 102.

- (1) Upon the filing with the county clerk or clerk of the board of supervisors of a petition signed by voters of the county equal in number to at least ten per centum of the whole number of votes cast in the county for governor at the last gubernatorial election asking that a referendum be held on the question of adopting one of the forms of government provided for in this chapter and specifying (a) the form, (b) the variation or variations, if any, among those authorized in articles five, six and seven of this chapter and in sections three hundred two and three hundred twelve, (c) the election method, (d) (if the election method is not a, d, g or h) whether party designations or nonpartisan ballots are to be used, and (e) the date on which such form of government if adopted shall take effect (which if plan A is proposed shall be the first day of January following the next general election of county officers after the submission of the question), it shall be the duty of the board of supervisors to submit the question or questions called for in such petition to the voters of the county at the next general election within the county held at least sixty days thereafter and to provide for the reading form in which such question or questions shall be placed upon the ballot.
- (2) Any variations submitted among those authorized in articles six and seven of this chapter shall be submitted as separate questions, the failure of any one of which shall not invalidate the approval of the form itself. The approval of any such separate question submitting an authorized variation shall be of no effect unless the form submitted at the same time is also approved or unless one of the forms provided for in this chapter to which the variation would also be applicable has been previously adopted. The petition submitting the variation may also make the adoption of the variation contingent upon the adoption of the form proposed by it, whether another of the forms provided in this chapter has been previously adopted or not. The petition may also under the same conditions submit as a separate question any of the variations authorized in article five or

any one of the alternative election methods or variations thereof authorized in this chapter. The failure of any election method so submitted shall leave the county's election method unchanged so far as that proposal is concerned and shall not invalidate the adoption of the form of government or other proposals submitted at the same time. No petition shall submit inconsistent questions, which could not all be adopted.

- (3) In advance of filing a petition for the submission of any question or questions under the provisions of this section, any qualified elector of the county may file with the county clerk or clerk of the board of supervisors notice of his intention to do so and specify the question or questions for which he intends to circulate petitions. Any such notice shall be accompanied by a deposit of twenty-five dollars. If one-third of the number of signatures required for submission are filed within ten days thereafter and the entire number required within thirty days, the deposit of twenty-five dollars shall be returned and no other petition or notice of petition or resolution, for the submission of a question or questions inconsistent in terms with the question or questions proposed, shall be accepted until the question or questions proposed in the notice of intention have been submitted or withdrawn. If the required number of signatures is not filed within the ten-day or the thirty-day period aforesaid the deposit of twenty-five dollars shall be paid into the general funds of the county and the notice of intention shall be of no effect.
- (4) In the absence of a petition or notice of a petition for a proposal inconsistent therewith, the board of supervisors may pass a resolution submitting any such question or questions to the voters on its own initiative, subject to the same provisions as to the submission of separate questions. Such resolution shall specify the date on which the form of government shall take effect if adopted, which if plan A is proposed shall be the first day of January following the next general election of county officers after the submission of the question or questions. The question or questions, whether first proposed by petition or by resolution, shall be so worded as to indicate by name the form of government proposed, the variation or variations, if any, the method of election proposed, and (if election method a, d, g, or h is not proposed) whether party designations or nonpartisan ballots are to be used; as, for example, "Shall the county of adopt the county mayor form of government with an elective district attorney, elimination primaries by districts and party designations, as authorized by the optional county government law? If the county mayor form of government is approved, shall the county have county collection of all

local taxes and special assessments, as authorized by the optional county government law? Shall all villages in the county be separated from towns as authorized by the optional county government law?"

- (6) If the petition or resolution requesting such a change fails to specify whether or not an existing variation from the standard form shall be retained, the variation shall be retained unless it is inconsistent with a new form adopted, in which case the standard arrangement for the new form shall supersede it. A change from plan D to plan A, plan B, or plan C, however, shall carry with it the standard arrangements of departments (as prescribed in article four) for the form adopted unless one or more of the authorized variations from those standard arrangements are specified. In this case also any of the variations in the powers and arrangement of local units of government within the county (listed in articles six and seven) which have previously been adopted by separate vote under the provisions of this section shall remain in effect unless otherwise specified.
- (7) A change to the form of government prescribed by the legislature for counties which have not adopted an optional form of county government may be submitted by the same procedure as any of the other changes permitted, in which case the question shall be submitted in substantially the following form: "Shall the county of abandon its present form of government and adopt the form prescribed by the legislature for counties which have not adopted optional forms of county government?"
- (8) Two or more of the questions authorized in this section shall not be submitted at the same election if they are inconsistent in their provisions and could not all go into effect if adopted. If a petition or notice of intention to file a petition

has been received or a resolution passed requesting the submission of one of the questions authorized in this section, no petition or notice of intention or resolution shall be accepted which conflicts with the prior petition or notice or resolution in any of its terms until the question requested in the prior petition or notice or resolution has been submitted or the prior petition or notice or resolution has been found invalid or become of no effect.

- (9) A petition filed under the provisions of this section may be made upon separate sheets and the signatures to each sheet shall be authenticated in the manner provided by the election law for the authentication of designating petitions. The several sheets so signed and authenticated, when fastened together and offered for filing, shall be deemed to constitute one petition.
- (10) Except as hereinafter provided, the board of supervisors shall cause a notice of any referendum taken under the provisions of this section to be published in two or more newspapers published within the county or having a general circulation therein, among which shall be represented if possible the two parties polling at the last preceding gubernatorial election the highest and next highest number of votes for governor and which in the board's opinion will bring such notice to the attention of the largest number of voters in all sections of the county. The notice shall contain the reading form of any question or questions to be submitted, and adequate statement of the effect of the adoption thereof, and the date on which the referendum is to be held. Such publication if in a daily newspaper or newspapers shall be twice a week for a period of three consecutive weeks, and if in a weekly newspaper or newspapers shall be for four consecutive weeks. The cost of such publication shall be a charge against the county. The county board of supervisors may provide for the sending of the notice by mail to every person entitled to vote within the county, in which case publication in newspapers may be dispensed with.
- (11) The question or questions shall be submitted in a manner similar to that provided by law for the submission to the voters of state and town propositions and questions.
- (12) If a majority of the votes cast on a question shall be in the affirmative and if the further requirements of this section have been substantially complied with, the form of government or change in the form of government submitted in the question shall go into effect on the date designated in the petition or resolution by which it was submitted and the change in the method of election, if any, shall go into effect at the next election of county officers following the referendum; but no elective official in office at the time of such election shall be retired before the

expiration of his full term of office. If an elective official of the county or of a unit of government within the county is thus continued in office beyond the time when his office would otherwise be abolished under the provisions of this chapter, the said official shall for the remainder of his term perform such duties related to his office as may be assigned him by the county board of supervisors, except that if the duties of his office are being assumed by a single unit of government other than the county he shall perform such duties as may be assigned him by the governing body of such unit. Except as thus provided any change in the form of government for the taking effect of which the petition or resolution submitting it does not specify the date shall take effect on the first day of January following its adoption.

(13) If two or more conflicting optional forms of county government are submitted to the voters of a county at the same election under the provisions of this chapter and other provisions of law and if all the other requirements for adoption have been complied with for two or more such forms, only the one which receives the largest affirmative vote in the county as a whole shall be deemed adopted.

SECTION 3. TERRITORIAL CHANGES

Where the legislature has not been denied power to incorporate local units by special charter it may freely alter municipal boundaries by special charter amendment. Bell v. Town of Pulaski, 182 Tenn. 136, 184 S.W.2d 384 (1945); Williams v. City of Nashville, 89 Tenn. 487, 15 S.W. 364 (1891). This gives the people in the affected area no voice in the matter.

Provision may be made for annexation by action of a municipal governing body with or without an initiatory petition or other popular participation. Annexation by home rule charter amendment is another method.² Popular participation may take the form of an election in the whole area with a majority of total votes being decisive or of an election in which the votes in the area to be annexed or detached and those in the municipality are separately counted under a requirement that a majority in each group is essential to carry the change. Again it may

² City of Fort Worth v. State ex rel. Ridglea Village, 186 S.W.2d 323 (Tex. Civ.App. 1945). In Texas the power is made available by the home rule enabling act. In Ohio, a constitutional home rule state, the grant to municipalities of all powers of local self-government is deemed to stop short of control of annexation. The subject is governed by general law. Village of Brook Park v. Cleveland, 26 Ohio Op. 536 (Ohio Com.Pleas 1943).

be nothing more than a written consent of a certain percentage of the owners of property situated in the zone of change. The property qualification is hardly in keeping with long-prevalent ideas about democratic methods in making political decisions. Nor is it realistic in an economic sense; corporate ownership and the interests of those who rent houses are important conditioning factors.

State administrative supervision or control of local boundary changes is exceptional, although the point already made about original incorporation can be urged here—there should be some means of relating a proposed change to the larger interests of the community. In Pennsylvania proposed annexation of a part of a township to a city has been subjected to review by the State Council of Education with respect to the effect on school districts and Council approval made a condition precedent to annexation.³ Such a vote is a one-sided safeguard for a single interest affected by annexation.

Substantive requirements vary greatly, but there is one element in annexation, contiguity, which is quite generally required.⁴ Compactness of territory is not so significant as in the case of original incorporation; it is not unlikely that the configuration of land proposed to be annexed to a city would be quite irregular. See Sharp v. Oklahoma City, 181 Okl. 425, 74 P.2d 383 (1937). Contiguity may mean compactness, however, in the sense that after annexation there will be a continuous boundary without any unassimilated areas within that line. Otherwise, a city might annex an area which touched it at two or more points, between which lay unannexed "islands." Village of Morgan Park v. City of Chicago, 255 Ill. 190, 99 N.E. 388, Ann.Cas.1913D, 399 (1912).

Other substantive factors, which may have gained legal effect, include the platting or subdividing of an area proposed to be annexed, present urbanization, adaptability for urban development and substantial agricultural uses in the area in question.

³ In re Baldwin Township, Allegheny County, Annexation, 305 Pa. 490, 158 A. 272 (1931) (statute upheld, Frazer C.J., dissenting).

⁴ There are exceptions. For example, Section 9202 of Remington's Revised Statutes of Washington permits annexation of non-contiguous land which is to be used for park, cemetery or other municipal purposes.

AMERICAN BEMBERG CORPORATION v. CITY OF ELIZABETHTON

Supreme Court of Tennessee, 1943. 180 Tenn. 373, 175 S.W.2d 535.

PREWITT, JUSTICE. Complainants filed their bill to have declared unconstitutional Chapter 3 of the Private Acts of 1943, and to enjoin the defendant City of Elizabethton from assessing and collecting taxes on their property. The Act in question undertakes to extend the corporate limits of the City of Elizabethton so as to bring the area owned by complainants into the city limits.

Complainants assert that the Act violates contracts had with the City in that their plants were located near the City with the understanding that their property was not to be taken into the corporation of the City; that said Act violates the obligation of a contract, which offends both the State and Federal Constitutions; and that in entering into said contracts the City was acting in its private or corporate capacity and not exercising a governmental or legislative function.

The City filed a demurrer, which was sustained, the chancellor holding that the Legislature in passing the Act was exercising a governmental or legislative power, and, further, that the purpose and effect of the contracts of 1925 and 1927 were to exempt complainants' property from taxation, and therefore in violation of Section 28 of Article 2 of the Constitution of Tennessee, which requires all property to be taxed according to its value so that taxes shall be equal and uniform throughout the State.

The contracts or resolutions passed by the City provided that complainants' property would not be included in the city limits without their consent, and even if their consent was obtained, then all taxes of the City were to be remitted for ten years following such consent.

In Town of Oneida v. Pearson Hardwood Flooring Co., 169 Tenn. 449, 452, 88 S.W.2d 998, 999, this Court said:

"The Legislature, clothed with power to create municipal corporations, may at will alter their boundaries without the consent of the municipality or the inhabitants of its territory. That is a political power which, in the absence of a constitutional restraint, is not open to review or hindrance by the courts. Section 3320 and subsequent sections of the Code of 1932 impose no restraint upon legislative action. Despite those provisions the Legislature may, by special act, extend or contract the corporate limits of a municipality. The power to detach territory from a municipal corporation is analogous to the power of annexing new territory. Williams v. Nashville, 89 Tenn. 487, 15 S.W. 364; McCallie v.

Mayor, etc., of Chattanooga, 3 Head 317, 318; 19 R.C.L. p. 732, § 38: 43 C.J. p. 109.

"When by the change of the corporate boundaries of Oneida defendant's property was placed beyond the municipal limits, it was no longer subject to taxation by the town. Miller v. Pineville, 121 Ky. 211, 89 S.W. 261; Attorney General of State of Michigan ex rel. Kies v. Lowrey, 199 U.S. 233, 26 S.Ct. 27, 50 L.Ed. 167; Laramie County v. Albany County, 92 U.S. 307, 23 L.Ed. 552."

The contraction of boundary lines by a legislative act so as to interfere with the payment of bonds issued by a municipality might be subject to constitutional objection, as was held in Von Hoffman v. City of Quincy, 4 Wall. 535, 18 L.Ed. 403.

So then the Legislature in passing the Act in question was performing a legislative or governmental act, and this being true, the City was without power to adopt the resolutions of 1925 and 1927 so as to perpetually bind the City.

Complainants also insist that said resolutions were not in violation of Section 28 of Article 2 of the Constitution of Tennessee, which provides that all property shall be taxed according to its value. . . .

In the instant case, complainants have had the benefit of an area adjacent to the corporate limits of defendant City for more than fifteen years, and we cannot say that the doctrine of equitable estoppel should be invoked against the City at this time. Persons or corporations dealing with a municipality are charged with the knowledge that the latter is a creature of the Legislature, and its charter may be amended or abolished by its creator.

Taxation must always be uniform and equal throughout the extent of the same jurisdiction. State taxes must be equal and uniform throughout the state; county taxes must be equal and uniform throughout the county; and city taxes must be equal and uniform throughout the city, so far as revenues for current expenses or future wants are concerned, though where new territory is added to an existing city all taxation for the payment of the debts of the old city may by statute be confined to the old city which created the debt. . . .

There is no doubt that great commercial advantages were secured by the defendant City in the location of the plants near it, and complainants have invested large sums of money in the construction of their plants and improvements incident thereto, and they assert that the resolutions were strong inducements in locating their plants near the City. However this may be, we are here dealing with a public corporation in its governmental capacity.

It results that all the assignments of error are overruled, and the decree of the chancellor is affirmed.

HENRICO COUNTY v. CITY OF RICHMOND

Supreme Court of Appeals of Virginia, 1941. 177 Va. 754, 15 S.E.2d 309.

EGGLESTON, JUSTICE. The subject matter of this controversy is the extension of the corporate limits of the city of Richmond by the annexation of certain territory from Henrico county. . . .

After the prescribed notice had been given to the proper officials of the county and had been published as required by Code, § 2957 (as amended by Acts 1924, ch. 441, p. 663), the Hon. Frederick W. Coleman, Judge of the Fifteenth Judicial Circuit, and Hon. A. D. Barksdale, Judge of the Sixth Judicial Circuit, were designated to sit with Hon. Julien Gunn, Judge of the Circuit Court of Henrico county, and to hear and determine the case.

The county of Henrico and certain interveners appeared specially and filed written motions to dismiss the proceedings for lack of jurisdiction. These were overruled, the case was heard on the merits and resulted in a judgment favorable to the city, which is here for review. . . .

The principles to be applied in interpreting annexation statutes are well settled. In Henrico County v. City of Richmond, 106 Va. 282, 294–295, 55 S.E. 683, 687, 117 Am.St.Rep. 1001, it was said: "The necessity for, or expediency of, enlargement [of the boundaries of a city or town] is determined by the health of the community, its size, its crowded condition, its past growth, and the need in the reasonably near future for development and expansion. These are matters of fact, and, when they so exist as to satisfy the judicial mind of the necessity for or expediency of annexation, then, in accordance with the provisions of the act, the same must be declared."

In City Council of Alexandria v. Alexandria County, 117 Va. 230, 84 S.E. 630, the court stressed the community of interest between residents of the city and residents of the territory proposed to be annexed, and the fact that their commercial, civic and social interests were identical. See, also, County of Norfolk v. City of Portsmouth, 124 Va. 639, 653, 98 S.E. 755.

In Warwick County v. City of Newport News, 120 Va. 177, 193, 90 S.E. 644, 649, it was pointed out that the proposal for annexation must be considered "from the viewpoint of the state, the city, the county, and the territory to be annexed." See, also, County of Norfolk v. City of Portsmouth, supra, 124 Va. at page 643, 98 S.E. 755.

In Warwick County v. City of Newport News, supra, it was pointed out that increasing the revenue of a city was not a ground of itself justifying annexation, nor was the loss of revenue by the county from which the territory was to be detached a defense to the proceeding.

All of these principles were collected and applied in the opinion in City of Lynchburg v. County of Campbell et al., 1925, 11 Va. Law Register, N.S., 400, written for the lower court by Judge C. Vernon Spratley, now a justice of this court. That case, in which no appeal was taken, involved many of the questions which are before us here, and that opinion is strikingly informative on the matters with which we are concerned.

In the case at bar the separate opinions of the three distinguished judges who constituted the trial court below, show that all of the principles to which we have adverted were carefully considered, the majority of the court being of opinion that an application of these principles to the facts necessitated an order in favor of annexation, while one of the judges was of opinion that the city had not made out a case.

In our opinion there is ample evidence to support the findings of the majority of the court.

The original city of Richmond, having a population of 250 inhabitants and an area of two-tenths of a square mile, was situated on the north bank of the James River at the falls. By nine successive annexations its territory has been expanded to an area of 22.99 square miles, with a population of 182,929 in 1930. Due no doubt to the topography of the area in and surrounding the city, the expansion has been largely to the north and west and into Henrico county, although in 1910 the town of Manchester, in Chesterfield county, south of the river, was annexed, and in 1914 there was a further expansion in this direction.

With the advent of cheaper motor transportation and the desire of people for larger building lots with more light and air, the inhabitants of a large city are no longer content to build their homes in congested areas. Consequently, if suitable locations are not available in the city, the population inevitably spreads beyond the city limits into the surrounding country. This has been Richmond's experience.

The evidence clearly shows that there is a decided lack of desirable residential sites in the city. True it is that there are areas not built upon, but the taste of one suited to a site in Windsor Farms is not satisfied with a location on Shockoe Creek.

Thus we find from the record that while approximately 180,000 people lived within the city in 1930, some 19,000 more lived just beyond the city limits in Henrico county. Experts on behalf of the city estimate that by 1960 the number of those living beyond the city limits, but adjacent thereto, will exceed 36,000.

It is estimated that 80% of the suburbanites who earn a living are employed or earn their livelihood in the city. Even a larger per cent of these market and shop there, use its streets and the facilities furnished by its public utilities. That the city is the center of the commercial, civic and social life of these people can not be questioned. As is said in the city attorney's brief, "How long would the Westhampton community continue to exist if the city of Richmond were moved fifty miles down the James River?" To ask this question is to answer it.

Aside from the congested condition in the city, which is amply shown in the record, it is manifest that the identity of community interests of those living within the city and those living in the area proposed to be annexed demand a unified central administration for the whole urban area. It stands to reason that the combined resources of the inhabitants of the city and of the annexed territory should result in better facilities for the territory as a whole, and the evidence on behalf of the city bears this out.

The city has developed a complete and adequate system of sanitary and storm water sewers for its entire area, with outfalls into the James River. It has been designed and constructed to dispose of all sewage and a large portion of the storm water originating in the urban community beyond its boundaries, and is capable of doing so efficiently and economically.

At the time of the adoption of the pre-annexation ordinance by the city in February, 1938, the county had provided no sewerage facilities for any of its urban communities. Parcels "A," "G" and "H" to the southeast of the city had no sewer connections at all. In Parcels "B," "C," "D" and "E" there were sewers which discharged through the city system into the James River.

In the latter part of 1938, Sanitary District No. 1, which comprises a portion of Parcel "E," authorized a bond issue for the construction of a sewage disposal plant. This project was in the course of construction at the time of the hearing below. As we understand it, the sewage is to be pumped from Parcel "E" through a main extending in a northeasterly direction to a disposal plant located on the southern side of Upham Brook, between U. S. Highways Nos. 1 and 2 north of the city. This plant is to drain into Upham Brook and into Chickahominy River to the northeast of the city. It is also contemplated that the project will serve the territory comprised in Sanitary District No. 5, which lies to the north of the city west of U. S. Highway No. 2. Sanitary District No. 5 covers a part of Parcel "D."

There is a mass of technical evidence in the record as to the feasibility of the operation of this project at an economical cost.

The city's witnesses point out that this method of disposal will necessitate the pumping of the sewage from Parcel "E" up a considerable elevation, and, furthermore, that the flow of water in Chickahominy River is not sufficient to properly take care of the system.

But aside from this, the proposed plan is by no means an adequate disposal system for the territory proposed to be annexed. No provision is made for sewerage in Windsor Farms, Rothesay, Westmoreland Place, Hill Crest, Paxton, Grove Avenue Crest and Hampton Hills in Parcel "E." Apparently this territory, the greater portion of Parcel "D," and all of Parcels "A," "B," "C," "G" and "H," to the east of the city, are to be left to be served by the city system, if, indeed, any service is to be provided.

We think the city's evidence demonstrates that it is far better equipped to furnish adequate sewerage facilities to the territory proposed to be annexed and at a less cost than the county.

At present the annexed territory is almost entirely dependent upon the city for its water supply. The record clearly shows that the city is in a position to furnish this territory with an abundant supply of pure water. It is true that the county has under consideration a plan to furnish water to a portion of the territory. But the majority of the trial court was not convinced of the feasibility of the plan, stating that the proposed water sheds were too small to guarantee a constant supply of necessary pure fresh water.

The city provides to its inhabitants a system of orderly and controlled collection and disposal of garbage and trash. No such facilities are furnished by the county. Trash is collected once a year, and county residents are entirely dependent upon their own devices and uncontrolled private scavengers for the collection and disposal of garbage and trash.

While the county furnishes some measure of fire protection, it can not be compared with that furnished by the city to its residents.

After hearing the conflicting testimony on the subject, the majority of the trial court likewise found that: "The facilities of the city of Richmond for a safer and better sanitary and police service, for schools and fire protection, and for safeguarding the health of the people are unquestionably superior to the facilities now in the territory proposed to be annexed."

The city is in a position to furnish the annexed territory adequate lights for its roads and streets. The county furnishes none. The same is true of parks and recreational facilities.

Much emphasis is laid in the county's brief on the opposition to annexation on the part of a number of freeholders and qualified voters in the annexed parcels.

It is true that some 2,800 of these signed petitions objecting to the annexation. It is significant that nearly all of these objectors reside in Parcel "E," which is populated by the wealthier residents of the county, most of whom earn their livelihood in the city and are prominent in its commercial, professional and social life. It may be noted, too, in passing, that the territory in which these objectors live is that to be served by the proposed sewerage and water plants which the county is constructing or contemplating constructing. Little objection seems to come from the less fortunate inhabitants in the other areas which are proposed to be annexed to the north, east and southeast of the city.

Although the proposed annexation removes from the county some of its heaviest tax values, the residents of the county who live outside the annexed parcels, with the exception of the county officials, are not protesting. The city's brief states, and we take it to be conceded, that, "Not a citizen of the county outside of the parcels decreed to be annexed intervened in the case to oppose annexation or even testified in opposition."

Moreover, it is no answer to an annexation proceeding to assert that individual residents of the county do not need or desire the governmental services rendered by the city. A county resident may be willing to take a chance on police, fire and health protection, and even tolerate the inadequacy of sewerage, water and garbage service. As long as he lives in an isolated situation his desire for lesser services and cheaper government may be acquiesced in with complacency, but when the movement of population has made him a part of a compact urban community, his individual preferences can no longer be permitted to prevail. It is not so much that he needs the city government, as it is that the area in which he lives needs it.

The county lays great stress on the fact that it has adopted a modern and "streamlined" form of government, while, it says, the city adheres to an "outmoded, fossilized, bicameral councilmanic form." But this is no answer to the annexation proceeding. Certainly, we think, there is ample evidence in the record to sustain the city's contention that regardless of its form of government it is financially able to furnish the improvements and to perform the services in the annexed territory which are promised in the pre-annexation ordinance.

It is true, as the county contends, that the proposed annexation will result in considerable loss of revenue to the county. That situation exists in every annexation proceeding. Warwick County v. Newport News, supra, 120 Va. at page 193, 90 S.E. 644. In a measure, at least, the county is compensated therefor by the terms of the annexation order. Moreover, as Judge Spratley pointed out in City of Lynchburg v. County of Campbell et al., supra, 11 Va. Law Register, N.S., p. 406: "Annexation as experience has proven will stimulate the growth of the county and districts immediately adjacent to the new lines, and in a short time the increased county and district values will provide to a great extent for the present loss of revenue suffered in these proceedings."

Finally, as to the interest of the State. In Warwick County v. Newport News, supra, 120 Va. at page 193, 90 S.E. 644, at page 649, we said: "The interest of the state lies along the line which promises the great[est] development."

It can not be seriously questioned that that "which promises the greatest development" of both the city and the territory sought to be annexed is the combination of the resources of this great urban community under a single political unit as contrasted with their continued separation under competing units. This the city's evidence clearly shows.

On the whole our conclusion is that there is ample evidence in the record to support the finding of the lower court as to the expediency and necessity of annexing the territory described in the order appealed from.

Shortly after the evidence had been concluded, the lower court announced its decision on the question of annexation. It announced that Parcel "E," as described in the pre-annexation ordinance, among others, should be included in the territory to be annexed. This included 92.77% of the territory in Sanitary District No. 1, but excluded the greater portion of the property of the Country Club of Virginia, a development just to the north thereof, both of which are in Sanitary District No. 1, and the property of the University of Richmond just to the north and west of this development.

After the decision had been announced, the University of Richmond appeared before the court and asked that its property be included in the annexed territory. Since the university's property is not subject to taxation the county did not vigorously oppose this request.

While the city indicated its willingness to have the university's property included in the annexed territory, it did so only upon the condition that the remainder of Sanitary District No. 1 be also included—that is, that the entire property of the Country Club of Virginia and the development lying between it and the University of Richmond be likewise included. It argued that this

latter territory should be included in order to comply with the statutory requirement that the annexation lines shall embrace "a reasonably compact body of land." Code, § 2958, as amended.

Judge Barksdale was of opinion that this request of the city should be granted. The view of the majority of the court was to include the property of the University of Richmond and a portion of the development lying between it and the Three Chopt road to the east. It declined to include the major portion of the property of the Country Club of Virginia and the greater portion of the development to the north thereof, which embraces the remaining 7.23% of the territory in Sanitary District No. 1.

In our opinion the request of the city for the annexation of the remaining portion of Sanitary District No. 1 should have been granted by the trial court. In the first place, the inclusion of this additional territory is necessary in order to comply with the statute as to the reasonable compactness of the body of land to be annexed. In addition to this, a number of witnesses for the city testified as to the expediency and necessity of the annexation of this territory, despite the fact that it was not included in Parcel "E" as described in the pre-annexation ordinance.

It is undisputed that this territory (with the exception of the property of the Country Club) is entirely dependent upon the city for its water supply and sewerage. The annexation order recognizes this, for it imposes upon the city the obligation of continuing to furnish water to that territory during the term of the current contract. The record also discloses that this contract may be terminated on December 31, 1941, by giving six months notice. Apparently no provision has been made for furnishing water to this territory if the city should decide to terminate the contract.

Moreover, over the objection of the city, the annexation order requires it to continue to take and dispose of the sewage through its mains from this excluded portion of Sanitary District No. 1 for an indefinite period. If the city must furnish such service to this area, then logically the territory should be under its control.

On the other hand, unless the territory is to receive water and sewerage service from the city, it is difficult to see how this small fraction of the present sanitary district can afford to render such service.

The Country Club of Virginia insists that its property in Sanitary District No. 1 should be excluded from the territory to be annexed. This consists of 142.2 acres, on which is located an 18-hole golf course, a small golf course, a number of tennis courts, a swimming pool, and a handsome club building. It is bounded

on the south by the River road, on the east by the Three Chopt road, and on the north by St. Andrews Lane and Ridgeway road. Its western line coincides with the western line of Sanitary District No. 1. The annexation order added to the city a strip of this property 250 feet deep bordering on the western side of Three Chopt road.

The club argues that none of its property should be included in the annexed territory; that no part of its land is "susceptible of urban development;" and that annexation will result in a ruinous increase in the amount of its taxes without any benefit whatsoever to it.

A glance at the map shows that in order to insure the annexation of "a reasonably compact body of land," this property should be included. There is no natural boundary between this and the other territory in Sanitary District No. 1.

The club is partly dependent upon the sanitary district for water and sewerage. While it is equipped with an automatic sprinkler system, it is unquestionably dependent upon the city for fire protection in case of serious trouble. It is likewise dependent upon the city for police protection in case of serious difficulty.

That the club is an asset to the city no one will question, but it is also true that the city is its main asset, for the record shows that it is largely supported by the residents of the city and of the territory to be annexed. While annexation will no doubt result in an increase of its taxes, there is no basis, we think, for the contention that this will be "ruinous."

We likewise find no basis for the contention that the club's land is not "susceptible of urban development." Certainly there is nothing to indicate that there is any material difference in the topography of its land and the fully developed suburb between the club and the grounds of the University of Richmond, a part of which the court saw fit to include in the territory to be added to the city.

In our opinion the annexation order should be modified to include the remaining territory in Sanitary District No. 1.

Since the whole of Sanitary District No. 1 is to be annexed, it is not necessary that we discuss the city's contention that the annexation order improperly compelled it to furnish water and sewerage to all of that territory. . . .

The county claims that the lower court failed to adequately compensate it for the value of the land on which the Brookhill school is located. The court allowed approximately \$26,000 for this property, which is in accordance with the testimony of the

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county's witnesses if the present zoning of the property is to be restricted to residential purposes. But the county contends that due to the advantageous location of this property on Chamberlayne avenue, which leads into U. S. Highway No. 2 proceeding to Washington, the land has a prospective increase in value of \$6,000, provided it is rezoned for business purposes. Therefore, it says, it should have been allowed this additional sum.

Code, § 2958, as amended, provides that the city shall "provide for the compensation to such county or counties for the then value of any schoolhouse or other public building of such county located within the annexed territory, which shall not be reserved to the county in the proceeding; . . ."

It will be observed that the compensation is to be fixed at "the then value" of the property—that is, the value at the time of the annexation. The additional value for which the county contends depends entirely upon the happening of a future event, namely, the rezoning of the property, which may or may not take place. Such increase in value is entirely speculative and was, we think, properly disallowed.

The county next contends that the lower court failed to require the city to adequately compensate it for the injury to the value and the impairment of the use of Montrose school. Code, § 2958, as amended, requires the city to compensate the county "for any injury to the value or the impairment of the use to the county of any schoolhouse therein by reason of the annexation."

The Montrose school is located on Route No. 60 (the Williamsburg road), about a mile east of the northeastern boundary of Parcel "H" in the annexed territory. The county claims that by reason of the annexation the school will lose 176 of its 269 pupils, which will result in a 60% impairment of the use of the school to the county. Therefore, it claimed damages in the sum of \$21,900, which is 60% of the present value of the building and equipment. The lower court allowed \$15,000 to the county for this item. The county contends that this award should be increased by the sum of \$6,900, while the city, in a cross-assignment of error, contends that no allowance whatsoever should have been made to the county on its claim.

There is testimony in the record that this school is overcrowded and that the transfer of pupils in the annexed territory to the city system will relieve that condition. No doubt, too, the court took into consideration the fact that the county, through its transportation system for school children, can make use of this school and relieve congestion in other quarters.

In the light of the conflicting testimony, we can not say that the action of the lower court was unfair either to the county or to the city.

Code, § 2958, as amended, further provides that a city which annexes a part of the territory of a county "shall assume and provide for the reimbursement of the county or counties for such just proportion of any existing debt of such county or counties or districts therein, . . . as may be determined by the court in the proceeding"

The evidence shows that pursuant to the authority of the board of supervisors, the county school board borrowed the sum of \$207,000 from the literary fund of the State (Code, § 632, as amended by Acts 1928, ch. 471, p. 1195), which, with grants from the Federal government, was used for the construction of school buildings at Glen Echo, Sandston, Varina, Glen Allen, and at the Virginia Randolph high school (colored).

The record also shows that before the entry of the order appealed from the school board had incurred additional debts, amounting to \$13,324, for the cost of completing some of these buildings which were in the process of construction at the time of the annexation proceeding. It proposes to fund these by obtaining a further loan from the literary fund.

The lower court required the city to assume 45.79%* of the principal amount of the bonds already issued (\$207,000), with interest, but refused to require it to assume any portion of the additional indebtedness of \$13,324 incurred to complete the projects.

The county assigns as error the action of the court in not requiring the city to assume any part of this additional indebtedness, while the city assigns cross-error to the action of the court in requiring it to assume any part of the \$207,000 of bonds already issued.

We will first consider the cross-assignment of error of the city, for if its position be well taken and it should not be required to assume any portion of the indebtedness, that will necessarily dispose of the county's assignment of error.

The principal contention of the city is that the indebtedness incurred by the Henrico *county school board* is not a debt of the *county* within the meaning of Code, § 2958, as amended. With this contention we can not agree.

The record discloses that Henrico county is one single county school district. And while the county school board is a body cor-

^{*} This represents the percentage of assessed values of real and personal property which the county will lose through annexation.

porate for certain purposes (Code, § 653, as amended by Acts 1928, ch. 471, p. 1202; Acts 1930, ch. 412, p. 884; Acts 1932, ch. 117, p. 124; Acts 1936, ch. 314, p. 502; Acts 1938, ch. 318, p. 468), Code, § 644 (as amended by Acts 1928, ch. 471, p. 1199; Acts 1938, ch. 46, p. 96), provides that the board of supervisors of counties in which school boards have borrowed from the literary fund, "shall include in its levies, or appropriate a fund sufficient, as the case may be, to meet its liabilities on such contract, . . ." This leaves no room for doubt that the State literary loans are county obligations which must be repaid by county levies laid on a county-wide basis. Indeed, the record shows that the required levies have been laid by the county.

The city next argues that it should not be required to assume any part of this indebtedness because the bonds constitute a specific lien on the schoolhouses, for the erection of which the loan was made (Code, § 645, as amended by Acts 1928, ch. 471, p. 1200), and that none of these buildings lie within the territory to be annexed or will become the property of the city.

This, we think, is entirely beside the point. The provision for reimbursement of the county for a "just proportion" of its debt is not conditioned upon the city's acquiring the property for the cost of which the debt was incurred. The manifest purpose of the provision is to reimburse the county for the loss of taxable values which the city acquires as the result of the annexation, and which reduces pro tanto the county's ability to discharge its debts.

In our opinion, the lower court was correct in requiring the city to assume the ascertained proportion of the bonds already issued to secure the loan from the literary fund.

The additional indebtedness of \$13,324 incurred by the school board for completing the projects is likewise an "existing debt" of the county within the meaning of Code, § 2958, as amended. Pending the funding of the debt by a loan from the literary fund, the county, of course, owes the money to those who have furnished the labor and materials. The order appealed from will, therefore, be modified to require the city to assume 45.79% of this additional indebtedness.

The order appealed from requires the city to assume 100% of a total bond issue of \$220,000, and certain additional obligations amounting to \$5,500, issued and incurred by Sanitary District No. 1 in connection with the construction of the sewer system to which we have referred. It also requires the city to assume 92.77% of obligations incurred by the district in connection with the proposed construction of the water supply system, to which we have likewise referred.

In an assignment of cross-error the city contends that it should not be required to assume more than \$40,000 of the amount expended on the sewer system, which, it says, represents the outlay necessary for repairs thereto. It argues that the construction of this sewer system is of no value to the city, which will use its own mains for furnishing sewerage to the annexed territory. The same argument is made with respect to the obligation incurred in connection with the proposed water supply.

The sanitary district bonds were issued under the Acts of 1932, ch. 186, p. 362, Michie's Code of 1936, § 1560aa, et seq. Under the terms of this act the net revenue derived from the operation of the system is to be set apart to pay the interest on the bonds and to create a sinking fund to redeem the principal thereof at maturity. In addition to this, the board of supervisors was authorized to "levy an annual tax upon all the property in said district subject to local taxation to pay such interest and to make payments into said sinking fund." Michie's Code of 1936, § 1560gg. The act contains no provision making the bonds an obligation of the county.

As modified by us, the annexation order will incorporate in the city limits the whole of the sanitary district. Having acquired the district's sources of revenue from which the bonds are to be paid, it is only equitable that the city should assume the payment of these obligations.

That the sewer system may be of no value to the city (assuming that to be true) is immaterial. There is no requirement in Code, § 2958, as amended, that reimbursement by the city for any proportion of the debt of a county or district is to be conditioned upon the usefulness of the project for which the obligation is incurred.

What we have just said likewise disposes of the city's contention that it should not be required to assume any portion of the obligations incurred in connection with the construction of the proposed water supply system for the district.

The allowance and disallowance of compensation for other relatively small items are complained of by both the city and the county. To review these in detail would unnecessarily prolong this opinion. They involve no important principles and, in our opinion, the correct conclusion was reached by the trial court as to each of them.

The order appealed from provides that the annexation shall "take effect at midnight on the 31st day of December, 1940." In view of the suspension of the order pending this appeal, the order will be amended to provide that it will take effect at mid-

night on the 31st day of December, 1941. Warwick County v. City of Newport News, supra, 120 Va. at page 202, 90 S.E. 644.

Subject to the modifications as herein indicated, the judgment of the circuit court is affirmed.

The city of Richmond having substantially prevailed on this appeal will recover its costs in this court. Code, § 2961.

Modified and affirmed.

The following memorandum submitted by the Municipal League of Seattle to the City Planning Committee under date of November 15, 1947, is worth considering along with the Henrico County case.

ANNEXATION—IS IT GOOD OR BAD?

The current flood of proposed annexations, aggregating nearly eight square miles or 10% of the total area of the present city, confronts the City Council with these important decisions:

- 1. Should it comply with the requests of all suburbs which want to come into the city?
- 2. Should it decline all such requests on the grounds of the greater necessity for fully developing the present city before taking in new areas?

Certainly the City Council should carefully screen all such requests and only annex such territories whose tax yield would produce revenue sufficient to pay a substantial share of the costs of new city services in these areas.

This eight square mile area will augment municipal expenses by from \$800,000 to \$1,000,000 a year. Immediate revenues from these districts from property taxes and per capita state grants from gasoline, liquor and other revenues would yield only about half this figure. This gap between revenues and expenditures would narrow as the years go on and these tracts build up with higher assessed values.

Benefits from Annexation

Offsetting higher costs and taxes, does a city gain more in the long run from early annexation of territory which eventually will be taken in, from early control of long-range planning, zoning, building regulations, layout of utilities and also by forestalling encirclement by new municipalities.

Seattle Ranks High in Area

It is of significant interest that Seattle now ranks fourth from the top of 23 cities between 250,000 and 500,000 population in its area of 71 land square miles. San Francisco, Milwaukee and Boston, with over 600,000 population, have only 44 square miles or about two-thirds the local area. Cleveland with twice Seattle's population has about the same area.

It should be remembered that the larger the city's area, the more stretched out and expensive are its city and school services with consequent higher taxes of various kinds.

Necessary Data for Each Area

With 5 areas now in process of seeking annexation, the City Council could well develop a standard procedure for appraising the merits of taking them into the main city. For each annexation, it should have the following information: assessed value, number of homes; total population and estimated number of families; present mileage of paved and graded streets; mileage of sewers and water mains; estimated tax yield from property taxes and state grants, as against the costs for new municipal services in the area and probable outlay for capital improvements for street lights, fire stations, sewers and sewage disposal facilities, parks, transit extensions, among others. A map presenting existing factors and facilities should be prepared for the Council's consideration.

Also, the Council should have reports from the engineering, fire, police, transit, light, water and health departments as to the estimated costs of new services which the district would require.

For some recent annexations, the city council has had before it some of this information. But because of the large number of new ones in the offing, it would seem that this procedure should be standardized.

Areas Seeking Annexation

Five tracts ranging from a few city blocks to five square miles are now in process of seeking annexation. From 1910 to 1940, the city area remained practically stationery at 71 square miles. Since then, 9 areas have been annexed, raising the total to 73.65 land and water square miles.

Here is the status of annexation in these tracts:

1. Seven blocks from 15th Ave. N.E. to 20th N.E. and north from present city limits to E. 92nd St. In this district of about 800 population, annexation was voted last week by a close margin of 62 for and 60 against.

2. Five square miles with an estimated 15,000 population northwest of city from Fremont Ave. west to Puget Sound and north from present N.W. 85th St. city limits to N.W. 145th St. Annexation petitions now are being circulated.

3. One square mile east of Fremont Ave. to 5th N.E. and north to N.E. 105th St. Petitions have just been filed with the

county commissioners and are being processed.

4. One and a half square miles southeast of city from Ryan to S. 128th St.; between 59th Ave. S. and Lake Washington to Renton City limits. Petitions are being circulated.

5. A tract southwest of city. Interested parties are assem-

bling information.

Annexation Procedures

Here are the two procedures for annexation under the State law:

- 1. A petition describing the area to be annexed and containing 20% of the voters at the last election is presented to the county commissioners who, if the petition is regular, must authorize an election. If this carries, the city council then decides whether to accept the annexation.
- 2. The second procedure under a 1945 law provides that a petition describing the area to be annexed and containing names of owners of not less than 75% of the assessed values of land and buildings, can be directly presented to the City Council. This enables non-resident property-owners to have a voice in the transaction.

Advantages and Disadvantages of Annexation

Here are some advantages and disadvantages of annexation both from the standpoint of the areas which desire to join the city, and of the municipal government of Seattle and the taxpayers in the present city.

1. From the standpoint of citizens in outside areas particularly those in the large five square mile tract north of city, bounded by the Sound, 85th St. city limits, 145th St. and Fremont Avenue. It is almost impossible to determine exactly how their taxes would be changed up or down. Basically here is what would happen. On them would be levied the city tax rate of 14.5 mills. Offsetting this, would be the elimination of the 3 mill county road, 1.5 mill county library and the 3 mill fire district tax, if citizens happen to live in such districts. Water and sewer district levies probably would continue until these districts are dissolved. Therefore, the new city tax rate would be higher than the offsetting county and district levies.

The school tax presents a more complicated problem. The boundaries of Seattle School District No. 1 automatically would be extended to the new city limits. If this district is annexed, its taxpayers would not start paying new city school taxes until 1949 because the County Assessor already has prepared the 1948 rolls. Their 1948 school tax rate is 33.5 mills, 20.5 of which was voted in 1946 only for 1948 collections. Thereafter, their tax rate would drop to 13 mills unless the special levies are again voted. Therefore, after annexation, taxpayers in this district in 1949 would pay 13 mills which is the same as the Seattle school rate or they would get no reduction in school taxes.

Coming into the city would cost them an important school service. At present in District 412, all children in the lower grades living over a half mile and older children living over a mile from school now are taken to school by bus. The Seattle school district uses the city transit buses to carry some children. But in the absence of transit facilities in this district, school pupils would have to walk to school.

Assessments Would Mount

Suburban taxpayers would face an inevitable increase in their assessed valuations after they come into the city. Market values of their homes generally would go up but soon the assessor would follow this by an increase in their assessed valuations which certainly would raise their property taxes above present levels.

Here are other benefits this district would receive. They would get city fire, police, health, street lighting, garbage, library and park facilities and services, among others. Their present water rates, if they are billed directly by the city and do not live in water districts, would drop the present 33% excess suburban charge. City garbage collection for which city taxpayers pay only a small sum in their annual tax bill would replace the usual \$1.00 monthly charge to private collectors in the suburbs. Their fire insurance premiums also would be reduced.

Whether or not these advantages would offset the disadvantages, is the business of the residents in these suburbs to weigh.

2. From the city's standpoint. It is almost axiomatic in municipal annexation that the average suburban residential tract yields far short of the revenues from property taxes and other sources which are necessary to pay for the additional municipal services and capital outlays the city is put to as a result of the annexation. This deficit has to be made up by taxpayers of the central city. As these annexed areas become populated and their assessed values rise producing more property taxes, this subsidy

from the rest of the city would be less. In fact, there are few areas inside the city which pay their way, the deficit being made up by the central high value commercial district.

The city \$16 million odd 1948 appropriation divided by the 71 square mile land area in the present city is \$233,000 per square mile. Of course each additional square mile annexed would not immediately cost this large sum annually, but it gives an idea as to the cost of running a city on an area basis.

How Much Revenue Would Area Yield?

Yield from property taxes. As nearly as can be estimated from the County Assessor's records, the assessed valuation for this 5 square mile area is about \$6,500,000. Multiplied by the 14.5 mill city tax rate, this valuation would produce about \$94,000 in property taxes.

Yield from Per Capita State Grants. The Association of Washington Cities estimates that cities will receive in 1948 about \$10 per capita from the state in gasoline, liquor, and other taxes. On the basis of an estimated 20,000 population in this area, it would add to the city revenues about \$200,000.

Thus, this district would add about \$294,000 to the city coffers in addition to which would be business and occupation, admissions and other taxes paid by this area. It might be liberally assumed that this district would yield \$300,000 a year to the city or about \$60,000 per square mile.

How Much Added City Costs from Annexation?

This is even more difficult to calculate. A clue comes from a recent City Engineering Department report to Mayor Devin which discloses that the $69\frac{1}{2}$ acre Lake Ridge annexation taken in last year costs the city \$11,712 a year in operating expenses. The following formula was used which city engineers say is applicable to similar suburban districts elsewhere. Incidentally, this well-built up district showed a deficit over its revenue yield besides which the city had to spend \$20,000 for a new interceptor sewer which suggests the possibility of similar capital outlays in other future annexations. The Ravenna annexation of $1\frac{1}{2}$ square miles will cost the city about \$250,000 as its contribution toward two new sewer systems in that district, plus the special assessments.

Service

- Garbage collection cost
- 2. Street maintenance, paved street Street maintenance, graded street

Per Year

\$1.97 per capita \$378 per mile \$500 per mile

Service

Per Year

3. Street lights at intersections, includes \$9.00 yearly for "juice" and maintenance and balance for 20 year amortization of original installation

\$14 per intersection

- 4. Sewer maintenance \$137 per mile
- 5. Police protection, 1947 budget \$4.98 per capita6. Fire protection, 1947 budget \$4.66 per capita
- 7. Loss from 33% reduction in suburban \$5.88 per family city water charges

Based on the above, the above city costs would amount to about \$100,000 per square mile which is far in excess of the \$60,000 per square mile revenue from this district.

Besides the above, there are undistributed costs for parks, library, health, election services and city overhead expense. After coming into the city, doubtless there would be a clamor for extensions of the city transit system with lengthened routes which could not help but operate at a loss for some time.

Most of the area drains toward the Sound which would require a new interceptor sewer line or lines with an outfall into the Sound as it cannot be attached to the present city sewer system. This would be likely to cost the city an additional sum because the property could not stand the entire assessment.

With respect to fire service, Chief Fitzgerald estimates that in a short time this district would require a new fire station, the building and site for which would cost about \$55,000; apparatus \$20,000 and \$37,000 a year for a crew of 12 men and station maintenance.

In general, the same factors of revenues and costs would apply to the other 4 areas involving about 3 square miles adjacent to other parts of the city boundaries.

While some of these additional city costs might not be immediately incurred, they would be inevitable. Future city budgets would contain increased askings by department heads on the grounds that they had to service more territory. The City Council, without sufficient revenues to meet them, would turn to other taxes, notably business and occupation, and raise them or impose new ones.

Also, the taxpayers in the districts would immediately impose on themselves special assessments for paving, sidewalks and similar improvements.

Character of Five Square Mile Tract

So far as annexations go, this five square mile tract is one of the best around the city. In many sections, it is well-built up with high-priced residences. It has several areas of good suburban business properties. The irregular and hilly street lay-out in the western part would add to the normal per mile maintenance service. It has several schools, including Loyal Heights in the Seattle School District, and the Broadview School. It has two fire districts with volunteer companies and apparatus supported by a three mill tax levy. It is doubtful that the city can use this light apparatus.

McKEON v. CITY OF COUNCIL BLUFFS

Supreme Court of Iowa, 1928. 206 Iowa 556, 221 N.W. 351, 62 A.L.R. 1006.

Morling, J. Proceedings for severance were formerly triable at law. Code Supp.1913, § 622. In re Town of Le Roy, 135 Iowa 562, 113 N.W. 347; In re Town of Union, 177 Iowa 402, 159 N.W. 178. The procedure provided by the present statute is a suit in equity. Code 1924, § 5617. This cause, which was brought in equity under the new statute, is therefore triable de novo.

The present channel of the Missouri river at Council Bluffs is comparatively uniform in its course. Prior to 1877, however, the channel at one point took a sharp bend northwardly for about two miles, curving thence to the west, south, and southeast, back to the line of its more general direction at a point about a half mile from the point of departure, this forming an indentation or loop or ox bow on the Nebraska side. In 1877 by avulsion the river cut through between the points mentioned, leaving about 1,200 acres within the ox bow on the northwesterly or Nebraska side of the river. The Supreme Court of the United States in Nebraska v. Iowa, 143 U.S. 359, 12 S.Ct. 396, 36 L.Ed. 186, decided that this territory remained a part of the state of Iowa. Prior to the avulsion, and up to the entry of the decree in this case, this ox bow territory was within the corporate limits of the city of Council Bluffs. To sever it from the city is the object of the present suit.

The territory, except on the present river side, is surrounded by the city of Omaha. The width of the river between the ox bow territory and the rest of the city of Council Bluffs is about three-eighths of a mile. The current is swift. There is no bridge there. There are no means of travel from this territory to the main part of Council Bluffs, except two bridges, the western ends of both of which are in the state of Nebraska. The Illinois Central Railroad Company owns a toll bridge over a mile east of the ox bow. Conditions are such as to make any important use of that bridge impracticable. The usual route between the ox bow territory and the main part of Council Bluffs is west and south 3¾ miles through Omaha to the Douglas Street bridge. This is also a toll bridge. The street car company does not give transfers to Council Bluffs. The distance from the center of the ox bow district over the Douglas Street bridge is, to the nearest high school in Council Bluffs 6 miles; to the business center of Council Bluffs 7½ miles; to the city hall and courthouse 8¼ miles; to the nearest fire station 6½ miles.

About three-fourths of the territory in controversy is used for farming and truck gardening. A number of residence additions, and some industrial plants, occupy the remainder. The northern section of the old river channel now forms a body of water known as Carter Lake, the shores of which on both sides are used to a considerable extent for clubs, resorts, and summer and permanent homes. The number of permanent residents of the territory is about 700, few, if any, of whom have their business occupations east of the river. There is in the territory one public school building, constructed partly of wood and partly of brick. It has four rooms and four teachers. The instruction is to and including eighth grade work. No other public buildings and no public park are there. Some water mains have been laid by the city of Council Bluffs. They are being paid for by the local taxpayers. The water for these mains is furnished through the Omaha waterworks. There are no sewers, except such as have been laid by private enterprise. There is one stretch of payement. It was originally constructed of cobble stones and later resurfaced. Original and resurfacing cost was paid for privately. Some of the streets have been graveled, but at private expense. The streets generally are unimproved. The city of Council Bluffs furnishes 1,000 feet of fire hose. Fire protection, however, comes from Omaha. Council Bluffs has furnished police protection during summer seasons, but calls upon Omaha department in cases needing more expeditious attention than Council Bluffs department can give. In case of arrest, the prisoner must be taken through Nebraska territory to the station east of the river. Reliance for police protection is chiefly upon the Omaha force. The city of Council Bluffs furnishes 14 street lights, costing in the aggregate \$226 a year. The current is provided by a private company supplying both Omaha and Council Bluffs. There is no public disposal of garbage. Telephone connection is with the Omaha central. Toll charges must be paid for communication with Council Bluffs proper. Postal service is from the Omaha post office.

Since the agitation for severance defendant's city council has made one or two annual appropriations of \$1,000 for street maintenance, of which only \$500 was paid. The taxable valuation of all the real and personal property in Council Bluffs is \$6,789,321, besides that of agricultural property, \$194,750. The taxable valuation of the ox bow real estate is \$163,427, and of the personal property \$4,752. The tax levy on the ox bow real estate for corporation purposes in 1925 was 67.8 mills, \$11,080.54, and in 1926 74.8 mills, \$12,224.33. The 1925 levy included for general sewer, \$621.01; main sewer, \$621.01; improvement, \$621.01; light, \$686.38; fire maintenance, \$1,078.61; fire equipment, \$228.79; fire pension, \$147.07; grading, \$457.59; garbage, \$310.50; waterworks, \$768.10; waterworks sinking, \$310.50; school, around \$21,000. The 1926 distribution is proportionately the same.

The purpose of municipal incorporation is to furnish local self-government and co-operative service. The needs of the municipality and the benefits to the property and residents thereon are the sole justification for inclusion of land within municipal limits. A municipality in this state may not, against the will of the owner, retain within its limits land merely for the purpose of deriving revenue from it. Evans v. Council Bluffs, 65 Iowa 238, 21 N.W. 584. It is the settled law of this jurisdiction that property may not be taxed for a purpose in which the owners or occupants have no interest, from which they can derive no benefit, and which is solely for the benefit of others, and that taxation for municipal purposes of agricultural lands, which derives no benefit from the municipal government, cannot be sustained. Morford v. Unger, 8 Iowa 82, 92; Deiman v. Fort Madison, 30 Iowa 542. See McKinney v. McClure, 206 Iowa 285, 220 N.W. 354.

The only evidence on the subject of possible direct means of communication between the ox bow territory and Council Bluffs proper over Iowa territory is that furnished by plaintiffs, and objected to by defendant, that a bridge would be of the length of 4,000 feet and would cost approximately \$1,250,000. city of Council Bluffs has heretofore made no substantial use of the territory, except as a source of revenue. On the record before us it must be held that the ox bow territory is not, and will not be, needed for the growth of the city, or for other municipal purposes. From the standpoint of municipal needs and convenience, and the welfare of the inhabitants, were it not for state lines, the territory would belong to Omaha, and not to Council Bluffs. No benefit of importance is derived from the municipal government of Council Bluffs, and there is no ground for holding that it will in the future work to the good of the inhabitants to have the ox bow territory continued as a part of

that city. Whether it should be organized into a separate municipality is, of course, not before us.

II. The city sets up laches, acquiescence, and equitable estoppel, based upon the absence of any objection to the inclusion of, or of any effort to detach, the territory for 50 years since the physical separation resulting from the change in the river. (Of course, the statute of limitations is not involved.) Laches is a defense in equity, but only when to allow it as a defense would be equitable. Mere delay, that does not work disadvantage or harm to others, is not such laches. Every case is governed by its own circumstances, and laches does not prevail as a defense where the adverse party has been placed in no worse position on account of the delay. Dennis v. Harris, 179 Iowa 121, 142, 153 N.W. 343; 4 Pom.Eq. (4th Ed.) § 1442.

Equitable estoppel does not arise, in the absence of reliance and injury. If the adverse party has not acted to his prejudice, he is in no position to assert an equitable estoppel. Harley v. Merrill Brick Co., 83 Iowa 73, 48 N.W. 1000; 5 Pom.Eq. (4th Ed.) § 951; 21 C.J. 1202.

Acquiescence in proper cases may amount to a defense, either as working a ratification or an estoppel. 21 C.J. 1216; 2 Pom. Eq. (4th Ed.) § 816 et seq. Ratification is the giving of validity to the act of another, implying power to do the act by the ratifier, and the doing of the act without his full authority by such other. See 7 Words and Phrases, 5927 et seq.; 4 Words and Phrases, Second Series, 123 et seq.

No prejudice has resulted to the city of Council Bluffs from the delay in asking for severance. The city has during the years subjected the property in question to municipal taxation without reciprocal benefits. Submission to an inequitable tax for one year can give no right to the imposition of it the next year. Such payment of taxes cannot be effectively set up as estoppel. Deiman v. Ft. Madison, 30 Iowa 542, 550.

Furthermore, the property owners have had each and every year the statutory right to severance. The condition giving them that right was a continuing condition, and the statutory right was a continuing right. None of the suggested defenses can apply to such a continuing and ever-existing and present right. Deiman v. Ft. Madison, 30 Iowa, 542; Smith v. Jefferson, 161 Iowa 245, 142 N.W. 220, 45 L.R.A.,N.S., 792, Ann.Cas.1916A, 97; MacGowan v. Gibbon, 94 Neb. 772, 144 N.W. 808.

The city relies upon State v. Des Moines, 96 Iowa 521, 65 N.W. 818, 31 L.R.A. 186, 59 Am.St.Rep. 381. That was an action in quo warranto to test the validity of annexation proceedings. There the city claiming jurisdiction had acted to its prej-

udice during the delay. The proceedings were subject to confirmation. The defects alleged were such as might be waived. The city had acted to its prejudice. The case was not one of a continuing right.

Severance was properly decreed. Ashley v. Calliope, 71 Iowa 466, 32 N.W. 458; Evans v. Council Bluffs, 65 Iowa 238, 21 N.W. 584; Luick v. Belmond, 109 Iowa 361, 80 N.W. 431; Johnson v. Forest City, 129 Iowa 51, 105 N.W. 353; McKean v. Mt. Vernon, 51 Iowa 306, 1 N.W. 617; Way v. Center Point, 51 Iowa 708, 1 N.W. 692.

Affirmed.5

CITY OF HOUSTON v. STATE ex rel. CITY OF WEST UNIVERSITY PLACE

Supreme Court of Texas, 1944. 142 Tex. 190, 176 S.W.2d 928.

TAYLOR, COMMISSIONER. This is a quo warranto suit brought on the relation of the City of West University Place through its elected officers (appearing in both their official and tax-paying capacities) and two taxpaying citizens of the unappropriated territory in question against the City of Houston and its elected officials in which plaintiffs seek to have Houston's ordinance purporting to annex said territory declared invalid. The trial court instructed a verdict in favor of plaintiffs and against the defendants, nullifying the ordinance. The Court of Civil Appeals affirmed the judgment. 171 S.W.2d 203.

The writ was granted upon the City of Houston's point alleging that the Court of Civil Appeals was in error in holding that the City could not annex territory adjacent to it if the result of such annexation was to preclude respondent from further expanding its boundaries. Upon mature consideration we hold that the tentative opinion which we entertained when the writ was granted, was correct. . . .

The territory in question was adjacent to both cities and under their respective charter powers was subject by constitutional and statutory right to annexation by either. . . .

Section 2 of the enabling act provides that cities adopting a charter or amendment under the Home Rule Amendment shall have "the power to fix the boundary limits of said city, to provide

⁵ While the Carter Lake community is a part of the Omaha metropolitan area it has, since the McKeon case, been incorporated and remains a municipality of the state of Iowa. See Richard C. Spencer, "29 Cities within Cities" 37 Nat.Mun.Rev. 256, 258 (1948).

For a collection of cases on disannexation see Note 117 A.L.R. 262 (1938).

for the extension of said boundary limits and the annexation of additional territory lying adjacent to such city" in accordance with its charter rules. Houston's charter (Sec. 2b) provides that its governing body "shall have power by ordinance to fix the boundary limits" of the city and to annex "additional territory lying adjacent to said city." The only limitation on the city's power to annex additional territory is that it shall be adjacent thereto and not a part of any other municipality, as will subsequently be shown.

The Court of Civil Appeals correctly stated in its opinion that it was not concerned with the motives of the governing body of the City of Houston in undertaking to annex the territory involved, and correctly pointed out that home rule cities in altering their boundaries must observe the procedure prescribed by the enabling act. No question was made by the Court of the city's method of procedure in the enactment of the annexation ordinance in the present case. Houston was in the process of passing its ordinance annexing the territory in question when respondent, West University Place, began proceedings looking to the annexation of the same territory, along with other territory. The Court of Civil Appeals held in this connection that the City of Houston by annexing the territory (which lay adjacent to both cities) would destroy the right of West University Place (also a home rule city) to thereafter annex additional territory, inasmuch as the result would be to complete the encirclement of that city: and for this reason declared the annexing ordinance void. The Court relied upon the Magnolia Park case, supra, as affording a basis for such holding. We cannot agree either with the Court's holding that the ordinance was invalid or with its view of the case relied upon.

The holding in the Magnolia Park case, insofar as it has any bearing upon the present case, was that one municipality could not absorb by annexation another municipality of equal dignity, and thereby destroy its right of self government guaranteed to it under the Home Rule Amendment. While it is true that the result of the passage of the annexation ordinance would be to absorb within the boundaries of the City of Houston all of the unappropriated territory mutually adjacent to that city and West University Place, none of the governmental power of West University Place would be thereby taken away. The result would be merely to leave none of the mutually adjacent territory for subsequent annexation. The result of the ordinance in the Magnolia Park case, had it been upheld, would have been to destroy the constitutionally guaranteed right of the City of Magnolia Park to govern itself. The right of West University Place to govern itself remains unimpaired, regardless of the fact no territory ad-

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jacent thereto remains for its further territorial expansion. No question was involved in the Magnolia Park case of the right of absorption by one municipality of all of the territory mutually adjacent to it and another municipality of equal dignity. That is the question presented here.

It is contended by West University Place, in effect, that since the annexation of the territory, if upheld, will be to so circumscribe it territorially that it cannot thereafter expand its boundaries, the annexation ordinance should be declared void on the ground that such was the purpose of the City of Houston's governing body in enacting the ordinance rather than a purpose to serve the city's municipal needs. We overrule this contention.

The following holdings of the Court of Civil Appeals made at the outset of its opinion in the present case answer this contention [171 S.W.2d 206]: "Now the power of a Home Rule City to fix its boundaries is the power to legislate. Prior to the adoption of the Home Rule Amendment to the State Constitution, the Legislature could fix or alter the boundaries of an incorporated city, and it was held in Graham v. Greenville, 67 Tex. 62, 2 S.W. 742, that such power was not restricted by the State Constitution. The Home Rule Amendment took this legislative power from the Legislature and conferred it upon cities which adopted a Home Rule Charter. Of course, in altering their boundaries cities must observe the procedure prescribed by the enabling act. See Note in 64 A.L.R. 1341; Steinhagen v. Eastham, Tex.Civ. App., 233 S.W. 660; Id., 111 Tex. 597, 243 S.W. 457; Hunt v. Atkinson, Tex.Com.App., 17 S.W.2d 780; Id., Tex.Com.App., 18 S. W.2d 594. This power of a Home Rule City to annex territory, being legislative power, is therefore not subject to being revised by the judicial power of the courts. See City of Gladewater v. State, 138 Tex. 173, 157 S.W.2d 641; State v. City of Waxahachie, 81 Tex. 626, 17 S.W. 348; Norris v. City of Waco, 57 Tex. 635."

The authorities cited by the Court sustain its conclusion (italicised above) and we approve it. The Court in overruling the City of Houston's motion for rehearing made more obvious the correctness of such a conclusion by stating that it had no way of determining "just what part of the territory less than the whole of what the city had attempted to annex the governing body would wish to incorporate within the city limits," pointing out that only the governing body could determine this since it involved the exercise of legislative powers, and citing County School Trustees v. District Trustees, 137 Tex. 125, 153 S.W.2d 434.

The City of West University Place is a small city (comparatively speaking), predominantly residential in character, adjoining the City of Houston. The Court of Civil Appeals in its opinion

calls attention to the fact that Houston has developed into an industrial city. We quote: "In 1850 its population was less than 2,400; in 1900 its inhabitants exceeded 44,000; in 1910 they exceeded 75,000; in 1920 they exceeded 138,000; in 1930 they exceeded 292,000; in 1940 they equaled 384,514. The figures given apply only to persons residing within the corporate limits of Houston. J. V. Goodwin testified that Houston population residing within its corporation limits is now increasing more rapidly than any other industrial city in the United States—at the rate of 40,000 a year."

We cannot say in the light of the record that the action of the governing body of the City of Houston in absorbing within its boundaries the territory in question, even though it resulted in encircling the respondent city, was so unrelated to petitioner's economic and municipal needs as to be wholly unreasonable and arbitrary and for that reason subject to judicial review. Such action invaded none of the property or constitutional rights of respondents. 37 Amer.Jur.. Municipal Corporations, sec. 29. . . .

We reverse the judgment of the Court of Civil Appeals, which affirms that of the trial court, and render judgment in favor of petitioner declaring valid its ordinance annexing the territory in question.

Opinion adopted by the Supreme Court.

McCOMBS v. WEST

Circuit Court of Appeals of the United States, Fifth Circuit, 1946. 155 F.2d 601.

[A Florida statute of 1903 provided for exclusion from any municipality with less than 150 qualified electors of lands, which from distance or other causes were "virtually or commensurately excluded from the benefits" of the municipality. The City of Ocoee was created in 1925 with an area of about 1400 acres. After it had several issues of general obligation bonds outstanding, property owners obtained decrees under the 1903 act excluding about 680 acres from the City. The city defended two of these proceedings, but after adverse decisions in both did not contest the later ones. Total assessed valuation before any of the exclusions was about \$1,500,000. In 1941 property in the city was assessed at about \$129,000 and that which had been excluded at about \$135,000. No bondholder was a party to any of the exclusion suits. Bondholders brought this suit for a declaration that the exclusion decrees were inoperative to relieve the affected lands from bond-service taxes, alleging that otherwise they would be denied due process of law, and prayed injunctions accordingly.]

SIBLEY, CIRCUIT JUDGE. . . .

The District Court held the decrees of exclusion are res judicata of the matters decided, binding on the city and on the petitioners, and not capable of being relitigated in this case; that the right to obtain exclusion under the Florida statute existed when the bonds were issued and bondholders took subject thereto; that petitioners and their transferrors have never had any lien upon the lands of defendants; their contracts have not been impaired by the State of Florida, nor their property taken without due process of law. The bill was accordingly dismissed. . . .

The meaning of the statute and the effect of an exclusion decree is a matter of State law, as to which we must accept the conclusions of the Florida courts. Whether the federal Constitution is transgressed thereby is a question on which we are to exercise an independent judgment. The words "qualified electors". and "virtually or commensurately excluded from the benefits of such municipal organization" have been interpreted for us. of the exclusion suits here involved, (City of Ocoee v. West, and City of Ocoee v. Beggs, supra), the former words were held to mean that the electors must be actually registered for voting in the city, as well as otherwise qualified, at the time the suit for exclusion is filed; so that neither citizens who might have registered but did not can be counted to make more than one hundred and fifty and so defeat the application of the statute, nor can those be counted who register afterwards and before the trial. Whether Ocoee had one hundred and fifty or more "qualified electors" was in each exclusion suit a question of fact necessary to be determined and it was determined negatively.

The city being thus established to be a small one within the exclusion statute, it was also necessary to determine whether the land sought to be excluded was "virtually or commensurately excluded" from municipal benefits. These vague words have been thus explained in Durham v. Pentucket Groves, 138 Fla. 386, 189 So. 428, 429: "The statute has to do with the exclusion of lands from small towns that never should have been included in it or which as now constituted, should be in right and justice excluded There is no basis for the operation of the statute unless lands have been included in the municipality that are not susceptible to municipal improvement. In other words. there must be a commensurate benefit to the lands for the taxes imposed on it. . . . The statute involved here only affects lands that have received no benefits and are without prospect of receiving any by being in the municipality. Under such circumstances, the owners may have them released at any time and when released, they are freed from the obligations of the town. The owner may petition to have them excluded any time the conditions warranting exclusion arise." It is not clear whether all these tests must concur, or either might suffice. As to the case then before it the court made no indication which applied, the sole question really being as to the consistency of the statute with the Florida constitution, but merely said: "In the absence of a showing to the contrary, we must assume that they (the lands) were legally excluded." We also must assume that legal grounds were proved in each exclusion here involved as against the city, both in the suits it defended and those it did not. And as between it and the landowners, there resulted a relief of the excluded lands from all debts and liabilities of the city, conclusively adjudged, and the city was no longer under duty to give municipal service.³

We come, therefore, to the effect of these judgments on the bondholders, who were not parties of record. In no like case before the Supreme Court of Florida have bondholders been parties, so that a judicial opinion could be given on this question. In the Pentucket Groves case, supra, the court took note that bonds were outstanding, and by way of dictum said: "It [the statute] was in effect long before the bonds in question were issued. It was prospective in operation and affected only those bond contracts made in the future. Bond purchasers were on knowledge of the statute and cannot complain of its provisions. The purchaser of bonds of such municipalities takes them burdened with the provisions of the statute. nothing from the town when he purchases its bonds but its promise to pay when due. He did not acquire a lien on any of its lands." There is a further dictum: "If lands were excluded that were not so contemplated by the act, they may, under City of Winter Haven et al. v. [A. M.] Klemm and Son [132 Fla. 334, 181 So. 153], be required to bear their part of the burden but if they were properly excluded, there is no theory under which they can now have the burden imposed on them." This last sentence would seem to indicate that the bondholders might, though the city is bound, still question the propriety under the statute of any exclusion. But the Winter Haven case which is cited had no relation to an exclusion decree under the statute, but involved a quo warranto by the State against the city.

On principle we think the dictum first quoted is the sounder one: "He (the bond purchaser) takes nothing from the town . . . but its promise to pay when due. He did not acquire a lien on any of its lands." In the case before us there was not

³ The Pentucket Groves case was followed in Town of Polk City v. Block 20, 138 Fla. 609, 189 So. 927, and Town of Eagle Lake v. Adams, 146 Fla. 165, 200 So. 367, in the application of the statute and exclusion decrees as between the property owners and their town. [Footnote by the court. Notes 1 and 2 are omitted.]

a special levy of taxes made at the time of issuing bonds and to be collected through the years to service them, as has happened in Texas. In case of such a levy there is an inchoate lien on the property then in the taxing district for the express benefit of the bondholders which may well be regarded as their security. Neither have we assessments against benefitted property to be collected and applied to the bonds, where again the assessments are the security for the bonds. In one of these bond issues the language is: "For the prompt payment of this bond and interest thereon at maturity, and for the levying of taxes sufficient therefor, the full faith, credit and resources of said city are irrevocably pledged." In the other two issues the language is, "For the (prompt) payment of the principal and interest of this bond the full faith and credit of the said City of Ocoee are hereby irrevocably pledged." No lien is thereby created and no property pledged. The city merely agrees in good faith to tax from year to year the property it can tax, and otherwise so to manage its financial affairs, within the law, as to promptly pay these debts if possible. No failure to do this is alleged. The city cannot help its citizens moving away with their personal property, nor the exclusion according to law of lands to which it cannot render municipal service. The cost of such service might be in excess of the taxes that could be collected from the lands, so that exclusion might really be for the benefit of all concerned. Of course the good faith pledged would not allow of any collusion with landowners. It would however be ordinarily to the interest of the city and its other property owners to retain within the city lands sought to be excluded, that they might continue to help bear the municipal burdens. The city with an interest in the matter identical with that of its creditors and other property owners may well be held to represent them in the suits authorized by the statute in question. A private corporation thus binds its general creditors in litigating about the title to its property or debts due to it. or its other assets. If it loses the case, its creditors may not afterwards by garnishment or receivership or other remedy relitigate such claims. Their rights depend on their debtor's rights and perish with them. There is even greater reason why a public corporation, in respect to its power to tax and govern, should be held to represent and bind by its litigation those having only general claims against it. We sustain the District Court in so deciding.

Nor is there in this a want of due process. The State of Florida by the operation of its laws and courts has deprived these bondholders of no property right. They still have all they contracted for as above set forth. It is not alleged that the City of Ocoee was by the exclusions made insolvent, or that it is not better off by not having to render municipal services to the excluded lands, if that would make any difference. We express no opinion about that. If the bondholders have been deprived by the exclusions of any real advantage, it has still been by due process of law, for as has already been said, they were represented in the exclusion suits by the city, which had interests at stake similar to those of its general creditors, and was really the only proper party to litigate the matter. Even where special assessments made to pay bonds were involved, the bondholders were held constitutionally represented and bound by good faith judgments against the taxing district. Kersh Lake Drainage Dist. v. Johnson, 309 U.S. 485, 60 S.Ct. 640, 84 L.Ed. 881, 128 A.L.R. 386.

The judgment of the District Court is Affirmed.

SECTION 4. MERGER AND CONSOLIDATION

In the law of private corporations a distinction has been observed between merger and consolidation. Merger is a process by which A absorbs B without break in the corporate life of A. Consolidation involves the creation of a new corporation which succeeds the constituent units. 15 Fletcher, Cyclopedia Corporations § 7041 (Perm. ed., rev. vol. 1938). For what purpose this distinction continues to be significant is not our immediate concern. In local government law the matter depends, to a peculiar degree, upon the express language of statutes. It may be purely a matter of labels, as where "consolidation" is used to make the absorption of a small municipality by a large one more palatable to the people of the former. The absorption situation, moreover, has, in some states, been provided for under the head of "annexation." The important consideration is the effect of the change upon: (1) the funds and properties of the constituent units, (2) the rights, duties and sundry legal relationships of the constituent units with third parties, (3) files, records and documents, (4) pending litigation, (5) existing ordinances, resolutions, rules and regulations, (6) officers and employees and (7) outstanding permits and licenses. Difficulties may be expected if these matters are not regulated by the enabling statute or the statute is not well thought out. Thus, the statute should make it plain whether the general obligation funded debt of a constituent unit is to become the burden of the new or surviving unit or is to be provided for by debt service taxes laid only on property within the boundary of the constituent unit. If, moreover, the statute provides that the ordinances, resolutions, rules and regulations of a lesser constituent unit shall become inoperative

and those of the principal unit shall be effective throughout the new unit until changed what would happen to the comprehensive zoning ordinance of a lesser unit? Patently, that ordinance should remain in effect until it can be integrated with the zoning pattern for the new unit. Again, what happens to civil service personnel and to pension or retirement funds?

In a home rule state provisions might be made for the submission of a home rule charter to the voters at the same time as the question concerning consolidation. The Oregon statute is summarized in State ex rel. Cutlip v. Common Council of City of North Bend, 171 Or. 329, 137 P.2d 607 (1943), a case in which the members of the common council of one of two cities, proposed to be consolidated, were required by mandamus to sit in joint meeting with the governing body of the other city to pass on the sufficiency of a consolidation petition. Under the statute it was their duty to designate members of a charter commission in the event the petition was found to be sufficient.

SECTION 5. DISSOLUTION

Dissolution is not a common affair with substantial well-established general function units. The old scheme of dissolving such a unit and then setting up a new one, with minor variations, in its stead, as a means of defeating creditors is interesting largely as history. The recent depression, so far as the writer is aware. produced no such manifestation of the spirit of repudiation. A number of pertinent leading cases reached the Supreme Court of the United States in the last quarter of the nineteenth century. The Supreme Court was, of course, strongly disposed to consider the new corporation fully liable on the obligations of the old on a simple successor corporation theory. Shapleigh v. San Angelo, 167 U.S. 646, 17 S.Ct. 957 (1897), involved the application of the succession theory to a situation, where, after exercising corporate powers, including the issuance of bonds, the town of San Angelo had been disincorporated by decree on direct attack by the state. Apparently the ground of the decree was the inclusion within the town of much unimproved rural land. The city of San Angelo was incorporated two years later. The area was the same save for the rural lands. In a bondholder's suit against the city on bonds of the town the Supreme Court embraced the view that the city was liable on matured coupons as a successor corporation to the town, which was to be deemed a de facto unit at the time the bonds were issued.

In quite a different category are the numerous ad hoc units and small municipalities which either never had any raison d'être or, for one reason or another, have ceased to have one. There are undoubtedly quite a few which do not operate but exist merely as corporate shells. They are ripe for "winding up." Mere non-user of the corporate franchise and powers does not of itself, under the prevailing view, effect a dissolution of an incorporated local unit. It is a public agency, an instrument of government, and does not stand on a footing with private corporations in this respect. I Dillon, Mun.Corps., § 330 et seq. (5th ed. 1911). The legislature may, of course, make non-user a legal ground for forfeiture or dissolution. The brief West Virginia provisions on the subject will serve to illustrate statutory regulation of both involuntary and voluntary dissolution of municipalities. W.Va. Code §§ 467–468 (Michie, 1943).

"If a majority of the votes cast be 'For discontinuance of charter,' then the charter rights and privileges of such town shall cease with the terms of office of the council then in existence: Provided, That all debts or other obligations outstanding against such corporation shall be settled in full."

It will be observed that the West Virginia statute makes no express provision for the disposition of the funds, other property and records of a dissolved municipality, although § 467 assumes that funds and other property go to the state. That, of course, is the effect of dissolution unless the statute directs otherwise, as in Illinois, where it is required that, after the business affairs of a dissolved municipality have been "closed up" any money remaining shall be transferred to school purposes. Ill.Ann.Stat. c. 24, § 7–47 (Smith-Hurd, 1942).

Alabama has an unusual statutory scheme for reinstatement, by order of the probate judge of a county, of the corporate organization of a town or city, which has permitted its organization "to become dormant and inefficient," upon petition of a majority of the taxpayers of the town. Ala.Code, Title 37, § 16 (1940). The petition is jurisdictional; one which was signed simply by a majority of resident taxpayers has been declared fatally defective. Town of Flat Creek v. Alabama By-Products Corp., 245 Ala. 528, 17 So.2d 771 (1944).

A mere change in classification, as from village to city, by reason of an increase in population, does not affect the corporate identity of a municipality, City of Oakwood, Ohio, v. Hartford Accident and Indemnity Co., 81 F.2d 717 (C.C.A. 6th, 1936).

A Note on De Facto Local Units

"Briefly stated, the doctrine (of de facto local units) is that where there is authority in law for a municipal corporation, the organization of the people of a given territory as such a corporation under color of delegated authority, followed by an user in good faith of the governmental powers incidental thereto, will be recognized by the law as a municipal corporation de facto, wherever through the failure to comply with the constitutional or statutory requirements the corporation cannot be said to exist de jure." C. W. Tooke, "De Facto Municipal Corporations under Unconstitutional Statutes" 37 Yale L.J. 935 (1928).

The basis for this doctrine is a very strong public policy supporting the security of units of local government and the conduct of their business against attack grounded upon collateral inquiry into the legality of their organization. It also underlies the theory that local units may exist by prescription. where there has been long user of corporate powers under forms of law and a law existed under which a unit could have been legally organized there is a presumption of regularity which overrides the fact that no record of original organization can be found. Robie et al., Trustees of School District No. 5 in Bath, v. Sedgwick and Hardenbrook, 35 Barb. (N.Y.) 319 (S.Ct. of N.Y. 1861). On the other hand, the state controls the objects and methods of creation of local units and, to effectuate a policy in that area, it should be free to challenge local departures from that policy. Ordinarily, when such a policy has clashed with that supporting the security of local transactions the former has prevailed. Long exercise of corporate powers without question from any quarter was not enough to silence the state; it might still attack directly, in quo warranto or some appropriate statutory proceeding, the legal existence of a local unit either on the ground that there was no authority in law for its existence or that there were irregularities in its organization, as the case might be. The obvious hardships and confusion which could be expected from a judgment of ouster has led some courts to exercise a discretion to deny relief to the state where there had been long acquiescence in the functioning of the challenged local unit. Probably the leading case is State v. Leatherman, 38 Ark, 81 (1881). For other cases see Note 101 A.L.R. 581 (1936).

While corporations by prescription are rare, the de facto doctrine is of some practical importance.

It may be conceded that for there to be a de facto local unit there must be some color of authority or warrant in law for its existence. Whether that element was present has been a question of some difficulty where it was alleged that a statute under which a local unit had been organized was unconstitutional. Were we bound by the observation of Mr. Justice Field in Norton v. Shelby County, 118 U.S. 425, 6 S.Ct. 1121 (1886), that an unconstitutional statute is void ab initio, a practical solution might be blocked. In a number of state courts, however, his rigid a priori approach has been rejected and collateral attack, based upon the asserted unconstitutionality of the basic statute.

not permitted. See Field, "The Status of a Municipal Corporation Organized under an Unconstitutional Statute" 27 Mich.L. Rev. 523 (1929). After reviewing the cases the late Professor C. W. Tooke concluded that the statute under attack was not alone sufficient color of authority but that, taken with a separate valid law or a recognition of the potential existence of the unit by the general laws or constitution of the state, it was enough. Tooke, op. cit. supra. This general motion of political existence simply means that the unit must be of a sort which is legally possible under the legal system of the state and usually would obviate all difficulty because the state constitution and general laws recognize the existence, prospective at least, of such units as munici-Suppose the unit in question is a new type of ad hoc creation and the constitutional question goes to the authority of the legislature to establish it? In other words the very question is whether the constitution recognizes such units. The United States Supreme Court has recently rejected the ab initio theory and recognized that a declaration of unconstitutionality does not erase what has gone before. Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 60 S.Ct. 317 (1940), rehearing denied 309 U.S. 695, 60 S.Ct. 581 (1940). If the adjudication adverse to constitutionality does not amount to retroactive invalidation of a statute, why was it not sufficient color of authority prior to that time to stand off him who would attack the existence of a local unit organized under it? It is well to bear in mind that "constitutionality" is not a matter of absolutes. It is, indeed, a relative matter conditioned by many variables, whether of time, place, person or circumstance. Nor does a court have jurisdiction "in rem" of a statute. Its function is to decide a constitutional question where necessary to the disposition of a case before it and to do so simply for purposes of that case. practical effect goes far beyond the reach of res adjudicata. of course, because stare decisis and common sense tell us pretty well what would happen in some other case, undistinguishable on the facts.

Defective incorporation may be obviated and a de facto unit rendered de jure by subsequent legislative recognition or validation. Recognition has been made out, where, after attempted incorporation, legislation has been enacted, which, for one purpose or another (apart from ouster or dissolution) treated a unit as a going concern. I Dillon, Mun.Corps. § 68 (5th ed. 1911). Validation may be employed freely where there are no applicable constitutional limitations. In Texas it has been held that the constitutional ban on incorporation of municipalities by local or special legislation does not preclude validation of the defective incorporation of a city under the general law. State v. Larkin, 41 Tex.Civ.App. 253, 90 S.W. 912 (1905). There is something

to be said for this, since the municipality will be governed by the general law and thus the purpose of incorporation under general law not defeated. The Texas Legislature has resorted quite frequently to validating measures with respect both to original incorporation and to annexation of territory. See, for example, Tex.Acts of 1941, c. 19, and Tex.Acts of 1935, 2d C.S., c. 440, § 1.

OCEAN BEACH HEIGHTS, INC., v. BROWN-CRUMMER INVESTMENT CO.

Supreme Court of the United States, 1938. 302 U.S. 614, 58 S.Ct. 385.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The question is whether for the payment of its outstanding bonds the respondent town may tax petitioners' lands which, without statutory authority, were included by boundaries defined in proceedings for its incorporation. Petitioners' contention is that the lands never were within the boundaries of the towns de jure or de facto, and that therefore they are not subject to its taxing power.

The Florida statutes empower the male inhabitants of any hamlet, village, or town "to establish for themselves a municipal government," Compiled General Laws 1927, § 2935, to be designated an incorporated town if it contains less than 300 registered voters, section 2936. They require notice specifying time and place of meeting and the proposed corporate limits, section 2937, and direct that "the qualified electors present, being not less than two-thirds of those whom it is proposed to incorporate, and not less than twenty-five in number, shall select a corporate name . . . for the municipality . . . and designate by definite metes and bounds the territorial limits," section 2938.

In 1892, in Town of Enterprise v. State, 29 Fla. 128, at page 145, 10 So. 740, 744, the state Supreme Court held that the statute did not permit incorporation of disconnected tracts of land, found a part of the territory proposed to be incorporated to be disconnected from the other part, and declared: "An attempt to incorporate two distinct detached tracts of land, as corporate territory under one government, is unauthorized and void."

In 1926, electors residing in Dade county, Fla., on the west side of Biscayne Bay, incorporated a town, Miami Shores, now called North Miami. The boundaries specified by the incorporators included approximately 16 square miles, 14 of which were on the west side of the bay and had a population of 2,500. Two square miles were on the east side and had but 12 inhabitants. Though nearly vacant, these lands were much more valuable than all the property on the west side. The water separating

the two areas is about a half mile wide. At the time of incorporation, construction of a causeway had been commenced, but its beginnings having been destroyed by hurricane later in that year, it has not been built. By land the distance between the settlement on the west side and the east side area is about ten miles, and to go by land from one to the other it is necessary to pass through another municipality. Petitioners own lands on the east side.

Between January 1, 1927, and April 1, 1928, the town issued bonds, \$238,000 of which are outstanding. In each bond the town pledged its faith and credit for payment and declared that provision had been made for the levy and collection, each year that the bond remained outstanding and unpaid, of sufficient taxes on all taxable property within its limits to pay principal and interest as they came due. But none of the bonds contained any statement indicating the boundaries of the town or in any manner representing that any part of the area on the east side of the bay was within its limits. The bonds were validated by decrees of the circuit court for Dade county. Sections 5106-5109, Compiled General Laws 1927. No owner of east side land was party to the validation suits and no question as to whether the town included any part of the lands east of the bay was there involved. Proceeds of the bonds were used for the construction of permanent improvements; the only part spent on the east side was \$6,000 for mosquito eradication, most of which went for equipment which the town still owns.

In a quo warranto suit brought by the state on the relation of its Attorney General in August, 1929, and in a later suit brought by owners of east side lands to cancel tax certificates on their lands, the state Supreme Court held that the statute relied on for creation of the municipality did not authorize inclusion of noncontiguous areas. Mahood v. State, 101 Fla. 1254, 133 So. 90; Leatherman v. Alta Cliff Co., 114 Fla. 305, 153 So. 845. And in those suits it was finally adjudged that the east side was not and never had been a part of the incorporated town, and that the town never acquired jurisdiction de jure or de facto over the land east of the bay. A decree of ouster as to the east side land was entered in December, 1931, and tax certificates on lands on that side were canceled. No bondholder was a party to either of these suits.

Prior to the quo warranto suit, the jurisdiction of the town over the east side was not challenged by the state, property owners, or others. And until prevented by the decree of ouster, the town exerted municipal authority on both sides of the bay within the boundaries defined by west side electors acting to incorporate the town. It laid taxes on east side lands, some of which were paid by petitioners.

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In 1930 respondent sued the town in the United States District Court for Southern Florida and got judgment on nine of the bonds. There was involved no question as to whether the east side lands ever were within the town or liable to be taxed to pay the bonds. In 1931 respondent brought in the same court a mandamus suit to compel the town and its officers to levy taxes on all the lands within the boundaries defined by the incorpora-Owners of land on the east side, including petitioners, were permitted to intervene. They maintained that the town had no jurisdiction over their lands or authority to tax them. The court entered a decree commanding the town and its officers to tax all the property within the town limits as originally defined. The town and its officers did not object to the decree nor appeal from it. The intervening east side owners attempted to have it reviewed in the Circuit Court of Appeals. The court held that, as the judgment was not against them, they had no standing to question it, and dismissed their appeal. Normandy Beach Development Co. v. U. S. ex rel. Brown-Crummer Inv. Co., 5 Cir., 69 F.2d 105.

Then respondent brought this suit for itself and other bondholders against the town, its officers, the clerk of the circuit court of Dade county, and east side landowners, including the petitioners. It alleged that the town was unable to pay the bonds unless permitted to levy and collect taxes on east side property; that the town and its officers were ready and willing so to do, but were prevented by the decrees in the Mahood and Leatherman Cases, and that the clerk of the circuit court was bound by the decree in the latter case. It prayed an injunction to restrain petitioners from interfering, by use of the ouster decree or otherwise, with the levy or collection of taxes on east side lands for the payment of respondent's judgment and the outstanding bonds and to restrain the town and the clerk of the court from refusing to levy or to take steps required for collection of such taxes. The town and its officers answered and in effect joined in the prayer of the bill. Petitioners moved to dismiss, the court denied their motion; two of them answered. The parties introduced their evidence; the court found the facts and entered its decree substantially as prayed. Petitioners alone appealed. The Circuit Court of Appeals affirmed on the ground that the town de facto included the east side lands. 5 Cir., 87 F.2d 978.

That view cannot be sustained. This case differs essentially from those dealing with good-faith attempts to organize municipalities under unconstitutional enactments presumed valid until adjudged repugnant to fundamental law. See, e. g., Clapp v. Otoe County, 8 Cir., 104 F. 473, 482; Speer v. Board of County

Com'rs, 8 Cir., 88 F. 749, 765; Ashley v. Board of Supervisors, 6 Cir., 60 F. 55, 64; City of Winter Haven v. Gillespie, 5 Cir., 84 F.2d 285, 287; State v. City of Cedar Keys, 122 Fla. 454, 462, 463, 165 So. 672. In the absence of a law authorizing the creation of a municipality de jure there can be none de facto. Mc-Quillan, Municipal Corporations, 2d Ed., § 175; City of Guthrie v. Wylie, 6 Okl. 61, 66, 55 P. 103; Norton v. Shelby County, 118 U.S. 425, 444, 6 S.Ct. 1121, 30 L.Ed. 178; Shapleigh v. San Angelo, 167 U.S. 646, 655, 656, 17 S.Ct. 957, 42 L.Ed. 310; Tulare Irrigation District v. Shepard, 185 U.S. 1, 13, 22 S.Ct. 531, 46 L.Ed. 773: United States v. Royer, 268 U.S. 394, 397, 45 S.Ct. 519, 520, 69 L.Ed. 1011; Evenson v. Ellingson, 67 Wis. 634, 646, 31 N.W. 342; Duke v. Taylor, 37 Fla. 64, 77, 19 So. 172, 31 L.R.A. 484, 53 Am.St.Rep. 232. The town de jure could not be made to include the east side. Mahood v. State, supra; Leatherman v. Alta Cliff Co., supra. Mere inspection of the statute and the defined boundaries unmistakably shows that the west side electors were without authority to incorporate the east side tract with that in which they resided. Unquestionably, these were detached tracts within the meaning of the statute. The state Supreme Court having held that attempted incorporation of detached areas was unauthorized and void, Town of Enterprise v. State, supra, there existed no color of authority for the inclusion of the east side. The east side lands could not be brought within the taxing power of the town by the owners' acquiescence in its attempted exertion of jurisdiction over them and payment of taxes thereon that it in form laid prior to the ouster decree. The town de facto could not derive from the consent of the east side owners jurisdiction that it de jure was without capacity to receive. The consent of owners of land located beyond permissible limits of the municipality cannot be made to serve as would a statutory grant of power. Hayes v. Holly Springs, 114 U.S. 120, 126, 127, 5 S.Ct. 785, 29 L.Ed. 81; Merrill v. Monticello, 138 U.S. 673, 693, 694, 11 S.Ct. 441, 34 L.Ed. 1069. As the east side lands never became liable to be taxed by the town to pay its bonds, respondents were not entitled to restrain petitioners from defending against levy and collection of the taxes or to any relief in this suit. The decree of the Circuit Court of Appeals will be reversed and the case will be remanded to the District Court, with directions to dismiss the bill. It is so ordered.

Reversed and remanded, with directions.6

⁶ It is to be borne in mind that direct attack upon the corporate existence of a local unit of a state cannot be made in a federal court. It does not have quo warranto jurisdiction. Morin v. City of Stuart, 111 F.2d 773, 129 A.L.R. 250 (C.C.A.5th, 1940).

Chapter 4

PERSONNEL

SECTION 1. OFFICERS

PEOPLE, ON COMPLAINT OF CHAPMAN, v. RAPSEY

Supreme Court of California, 1940. 16 Cal.2d 636, 107 P.2d 388.

CARTER, JUSTICE. This is an action in quo warranto instituted by plaintiff and appellant with the authorization of the Attorney General of California pursuant to the provisions of section 803 of the Code of Civil Procedure to determine by what right and authority the defendant and respondent held the office of city judge of the city of San Bruno in San Mateo county. The city of San Bruno is a city of the sixth class, organized pursuant to the provisions of section 850 et seq. of the Municipal Corporations Act (Deering's General Laws, Act 5233).

The complaint alleged that on May 14, 1924, the city council of said city appointed the defendant as city judge of said city, and thereafter he took possession of said office and ever since has been and now is in control of said office; that on May 25, 1937, said city council appointed the defendant as city attorney of said city, and thereafter he took possession of said office and ever since has been and now is in control of said office.

The prayer of the complaint was for judgment that said defendant is not entitled to the office of city judge and that he be ousted and excluded therefrom.

To said complaint the defendant interposed a general demurrer which the trial court sustained without leave to amend, and thereupon entered judgment dismissing said action.

Appellant contends that the positions of city attorney and city judge of a city of the sixth class are incompatible and that one person cannot fully perform the duties of both positions at the same time without giving rise to such incompatibility as must operate to vacate the first position held. Respondent contends that a city attorney of a city of the sixth class is not a public officer, and even if he were such officer, the duties imposed upon him by statute are not such as to conflict with his duties as city judge and that there is no incompatibility between the two offices.

Authority for the appointment of a city attorney of a city of the sixth class is contained in section 852 of the Municipal Corporations Act (Deering's General Laws, Act 5233), wherein a city council is authorized to appoint "a city attorney and such other subordinate officers or employees as in its judgment may be deemed necessary". The compensation of such city attorney may be fixed from time to time by the city council by resolution or ordinance and he shall hold office during the pleasure of said city council. Section 879 of said Municipal Corporation Act prescribes the duties to be performed by such city attorney as follows: "It shall be the duty of the city attorney to advise the city authorities and officers in all legal matters pertaining to the business of said city, to frame all ordinances and resolutions required by the city council, and perform such other legal services as said city council may require from time to time. "

Other statutory provisions confer the following additional duties upon a city attorney of a city of the sixth class: To approve all bonds, notes and warrants which are to secure city deposits (Act 2834a, section 4 of Deering's General Laws); to defend all suits for damages brought against any officer of the city on account of injuries to person or property resulting from the negligence and carelessness of such officer or from the dangerous or defective condition of any public streets, highways, buildings, parks, grounds, or works due to such officer's negligence or carelessness (Act 5150, section 2 of Deering's General Laws); to defend the city in any suit for damages brought against the city on account of injuries to person or property alleged to have been received as a result of the dangerous or defective condition of any public streets, highways, buildings, parks, grounds, works or property (Act 5149, section 2 of Deering's General Laws): and to abate public nuisances (section 731 of the Code of Civil Procedure).

While there is no specific provision in the statutes requiring a city attorney to take an oath of office, section 853 of the Municipal Corporations Act provides: "Every officer of such city, before entering upon the duties of his office, shall take and file with the city clerk the oath of office required by the Constitution and the laws of the State."

In view of the statutory provisions creating the position of city attorney in cities of the sixth class and conferring upon such attorney the duties and responsibilities hereinabove specified, it would seem to be in harmony with the policy of this state as declared in its constitutional and statutory provisions to require that a city attorney of a city of the sixth class should take the oath required by the Constitution and laws of this state in accordance with the above-quoted provision of section 853 of the Municipal Corporations Act.

While it is true that the compensation and term of office of a city attorney of a city of the sixth class is fixed by the city council of such city, it is equally true that the duties of such attorney as prescribed by statute pertain to the public and are continuing and permanent, and we think it is clear that the office of city attorney of a city of the sixth class falls well within the definition of the term "public office" as defined by this court in the leading case of Patton v. Board of Health, 127 Cal. 388, 59 P. 702, 706, 78 Am.St.Rep. 66, wherein this court said: "It seems to be reasonably well settled that where the legislature creates the position, prescribes the duties, and fixes the compensation, and these duties pertain to the public, and are continuing and permanent, not occasional or temporary, such position or employment is an office, and he who occupies it is an officer. In such a case. there is an unmistakable declaration by the legislature that some portion, great or small, of the sovereign functions of government are to be exercised for the benefit of the public, and the legislature has decided for itself that the employment is of sufficient dignity and importance to be deemed to be an office."

In the case of Leymel v. Johnson, 105 Cal.App. 694, 288 P. 858, 859, the District Court of Appeal quoted with approval from volume 21, California Jurisprudence, pages 819 and 820, as follows:

"The words "public office" are used in so many senses that the courts have affirmed that it is hardly possible to undertake a precise definition which will adequately and effectively cover every situation. Definitions and application of this phrase, depend, not upon how the particular office in question may be designated nor upon what a statute may name it, but upon the power granted and wielded, the duties and functions performed, and other circumstances which manifest the nature of the position and mark its character, irrespective of any formal designation. But so far as definition has been attempted, a public office is said to be the right, authority, and duty, created and conferred by law—the tenure of which is not transient, occasional, or incidental—by which for a given period an individual is invested with power to perform a public function for public benefit.

"The individual who occupies such an office is a public officer. He is a public agent and as such acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give to acts performed by the officer the authority and power of a public act or law. An "incumbent" is one who is in the present possession of an office. The terms "officer" and "office" are paronymous, and in their original and proper sense are to be regarded as strictly correlative. They may be used in

a sense other than the proper one, but the presumption is, unless the contrary appears, that the proper sense was intended.

"'Of the various characteristics attached to public office by definition, some are regarded as indispensable, and others, while not in themselves conclusive, are yet said to indicate more or less strongly the legislative intent to create or not to create an office. One of the prime requisites is that the office be created by the Constitution or authorized by some statute. And it is essential that the incumbent be clothed with a part of the sovereignty of the state to be exercised in the interest of the public.'"

We see nothing in the above-quoted excerpts which can be said to be repugnant to a pronouncement that a city attorney of a city of the sixth class is a public officer occupying a public office under the law of this state, and we are of the opinion that he is such public officer invested with all the rights and privileges and subject to all of the limitations and restrictions imposed by the Constitution and laws of this state and considerations of public policy.

Turning then to the question as to whether or not the positions of city judge and city attorney of a city of the sixth class are incompatible and cannot be held by one person at the same time, our attention is directed to section 882 of the Municipal Corporations Act (Deering's General Laws, Act 5233), which provides in substance that a city court is established in said city, to be held by a city judge, which in cities having a population of less than 30,000 shall have the same jurisdiction as a justice's court of a Class B in all civil and criminal actions arising within the corporate limits of such city and which might be tried in such a justice's court, and that such city court may also exercise the jurisdiction of a court of small claims in the same manner as provided by law for the exercise of similar jurisdiction by justices of the peace.

Turning to subdivision 2 of section 112 of the Code of Civil Procedure we find that justice's courts of Class B have original jurisdiction in all cases at law in which the demand exclusive of interest or the value of the property in controversy, amounts to \$300 or less, except cases of law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll or municipal fine.

It is conceded by both parties to this action that there is no statutory inhibition against the holding of both of the offices here in question by one person at the same time and that the impediment to such holding must be predicated upon the common law doctrine of public policy which is well recognized as the foundation for many decisions of the courts of this state.

This policy and the rule which developed therefrom was given attention in the case of People v. Garrett, 72 Cal.App. 452, 237 P. 829, 830, where the court said: "The doctrine arising from attempts by single individuals to exercise the functions of incompatible offices springs out of considerations of public policy . . ., such considerations arising naturally from the view that two offices cannot be held by one person when, from the divergent character of the offices, the public interest will suffer thereby." . . .

In the various statutes to which we have referred herein as specifying the duties which a city attorney of cities of the sixth class is required to perform, it is obvious that he may be required from time to time to appear before the city judge and prosecute or defend actions to which the city is a party. Many cities of the sixth class now own their own utilities such as water and electricity, and quite often it is necessary for such city to institute proceedings for the collection of claims for water and electricity furnished their patrons. Such actions could properly be brought in the city court, and the city attorney would, of course, represent the city. It is obvious that he could not do so if he were also city judge. As was declared by the Supreme Court of Maine in the case of Howard v. Harrington, 114 Me. 443, 96 A. 769, 771, L.R.A.1917A, 211: "He cannot be both prosecutor and judge. The duties are repugnant. He can only perform the duties of one office by neglecting to perform the duties of the other. It is not for him to say in a particular instance which he will perform and which he will not. The public has a right to know with certainty. Stubbs v. Lee, supra [64 Me. 195, 18 Am.Rep. 251]. Thence it is that two such offices must be held to be incompatible."

The two offices in question being incompatible, it follows that when the respondent accepted the office of city attorney, said acceptance had the effect of vacating or terminating his right to hold the office of city judge. As was said in People v. Garrett, supra: "The rule is settled with unanimity that where an individual is an incumbent of a public office and, during such incumbency, is appointed or elected to another public office, and enters upon the duties of the latter, the first office becomes at once vacant if the two are incompatible (Mechem, Public Officers, § 419; 22 R.C.L. tit. 'Public Officers,' § 63). . . . "

It appearing from what we have said in the foregoing opinion that respondent was at the time of the commencement of this action unlawfully holding the office of city judge of the city of San Bruno, the present action in quo warranto was the proper method of challenging his right thereto, and the complaint on behalf of appellant alleged sufficient facts to constitute a cause

of action, and defendant's demurrer thereto should have been overruled.

The judgment is reversed with directions to the trial court to overrule the demurrer and proceed with the disposition of the cause in accordance with the views herein expressed.¹

The principal case involved incompatibility of functions. Incompatibility may also arise from the relation of the two offices, as where one involves power to appoint the other, supervision over it or power to audit its execution.

A closely related question is whether, assuming that two offices are not otherwise incompatible, public policy forbids the holder of one, with power of appointment to the second, to appoint himself. An affirmative answer has been given in a situation where the appointee was a member of an appointing body and he did not participate or his vote was not decisive. Note 30 Calif.L.Rev. 686 (1942); Note 133 A.L.R. 1257, 1265 (1941).

The distinction between a public office and public employment obviously makes for important differences in legal effect. There is no property or contract element in the former to stay the hand of government. While an officeholder may invoke the aid of the law to protect him in his position as such, whether to enforce payment of salary earned, to oust a usurper, or what not, he has no vested interest as against the state and his office may be swept from under him at midstream without violating any federal constitutional guaranty. Higginbotham v. City of Baton Rouge, La., 306 U.S. 535, 59 S.Ct. 705 (1939). The same is true as to state due process and contract clauses as had been decided by the Louisiana Supreme Court in the case last cited.

The determination of the question whether X is an officer or employee must be made with reference to the particular language of the pertinent provision of positive law and to the purpose for which the decision is being made. What, for example, is the status of a city manager under a constitutional provision limiting the salaries of "public officers"? The Kentucky Court of Appeals has ruled that he is an officer, not an employee. City of Lexington v. Thompson, 250 Ky. 96, 61 S.W.2d 1092 (1933). The court was impressed by the broad governmental powers exercised by the manager. The real difficulty lay with the constitutional provision itself. A proposal to amend it, initiated by Ky.Acts of 1942, c. 171, failed at the polls in 1943.

Is a police officer of a city an employee in the sense of a workmen's compensation law applicable to persons in the service of

¹ Discussed in Note 29 Calif.L.Rev. 535 (1941).

employers under contracts of hire? Should the fact that a police officer exercises governmental authority as a conservator of the peace and thus is a civil officer in that sense control the narrow compensation question? It was accorded that effect in Cornet v. City of Chattanooga, 165 Tenn. 563, 56 S.W.2d 742 (1933).

Constitutional and statutory provisions against dual officeholding are common. They vary widely. Section 4 of Article XIX of the Louisiana Constitution of 1921 is set out here merely as an illustration, not necessarily typical, of the general type of provision.

Section 4. No member of Congress, nor person holding or exercising any office of trust or profit under the United States, or any State, or under any foreign power shall be eligible as a member of the Legislature, or hold or exercise any office of trust or profit under the State; nor shall any person hold or exercise, at the same time, more than one office of profit except that of Justice of the Peace or Notary Public. Provided, this section shall not apply to Officers in the Reserve of the United States Army, Navy, Marines, and National Guard.

The reference to an office "under the State" suggests state, as distinguished from local officers. The Louisiana Supreme Court has adopted what amounts to a middle position. It treats the clause as applicable to officers whose duties concern the state at large although exercised in particular local areas. This brings sheriffs, clerks of courts and members of parish school boards, which are units in a statewide school system, within the reach of the clause. State ex rel. Wimberly v. Barham, 173 La. 488, 137 So. 862 (1931). Most local officers would remain unaffected. Legislation may, of course, bridge the gap. See La. Criminal Code, Art. 137 (1942).

If the constitutional language is general and refers, for example, to holding more than "one lucrative office at the same time", local as well as state offices are covered. See Tenn.Const., Art. II, § 26.

The elements of honor and trust gain little notice in the cases. It is the profit factor which stands out, even where the constitution reads as does that of Louisiana.

While in some states positive law expressly gives acceptance of a second office in violation of a dual officeholding prohibition the effect of vacating the first, that is the general rule elsewhere without aid of such a provision. See Note 100 A.L.R. 1162, 1170 (1936).

If the first assumed of the two offices was a seat in the legislature what would be the effect of the house seating one over the dual officeholding objection? Does the power of the house to determine the qualification of its members render the decision of the house final in this type of situation? The Tennessee Supreme Court has ruled in the affirmative. State ex rel. Ezzell v. Shumate, 172 Tenn. 451, 113 S.W.2d 381 (1938). In these circumstances, since the constitution forbids holding more than one lucrative office at the same time, the individual's acceptance of the second office would, doubtless, be rendered abortive. This, of course, is the reverse of the normal pattern—vacation of the first office.

A state cannot control the public offices of another sovereign. Thus, it is usually decided that, if the first office assumed existed under another sovereign, one could not qualify for the second post until he had actually surrendered the first. See State ex rel. Welty v. Outland, 149 Ohio St. 13, 77 N.E.2d 245 (1948), and collection of cases in Note 100 A.L.R. 1162, 1183 (1936). The quoted Louisiana provision is not alone in making express exception for commissioned officers in the armed services of the United States. See, for example, Tex.Const., Art. 16, §§ 33, 40. An officer in the armed forces is an officer of the United States. Thus, the situation may present difficulty, absent an appropriate exception. See Note 157 A.L.R. 1456 (1945) citing earlier annotations. A leave of absence plan may be an adequate solution. See Note 30 Calif.L.Rev. 99 (1941) and In re Advisory Opinion to Governor, 151 Fla. 44, 9 So.2d 172, 140 A.L.R. 1492 (1942).

Is one who is guilty of dual officeholding to be treated as a de facto incumbent of the first office? The policy supporting the de facto doctrine plainly applies unless it is completely overridden by the policy against multiple officeholding. policy is bolstered by the sanction of ouster (and, in some states, criminal liability). It may be doubted that the additional sanction of nullifying acts affecting the interests of local units and innocent third parties would be warranted. The decisions are not in harmony. The drastic view is represented by Pruitt v. Glen Rose Independent School District, 126 Tex. 45, 84 S.W.2d 1004, 100 A.L.R. 1158 (1935), in which it was decided that acceptance of the office of county tax collector by one who held the office of school district tax collector completely vacated the latter and automatically relieved sureties on the bond securing its faithful performance. This result was reached despite the provision of the Texas Constitution that all officers shall continue to perform the duties of their offices until their successors have duly qualified. Tex.Const., Art. 16, § 17. In a recent Ohio case it was determined that one, who, in legal effect, had vacated his common pleas judgeship by going on active duty as an Army officer, was entitled, as against the state, to keep the

amount paid him as salary after he returned from the Army and resumed the bench without re-election or appointment. State ex rel. Witten v. Ferguson, 148 Ohio St. 702, 76 N.E.2d 886 (1947).

Under Section 2 of Article 6 of the Indiana Constitution no person is eligible to hold the office of township trustee for "more than eight years in any period of twelve years". Section 3 of Article 15 provides that one holding an office for a given term shall hold for that term and until "his successor shall have been elected and qualified." It has recently been decided that one who has served eight years as township trustee continues in office as a holdover, despite the eight-year limitation, where his elected successor dies before qualifying. State ex rel. Fares v. Karger, 77 N.E.2d 746 (Ind. 1948).

BLACK v. SUTTON

Court of Appeals of Kentucky, 1945. 301 Ky. 247, 191 S.W.2d 407.

SIMS, JUSTICE. On the first appeal of this case reported in 299 Ky. 836, 187 S.W.2d 731, the judgment was reversed because certain ordinances and resolutions upon which the action was founded were not filed with the petition as required by Civil Code of Practice, § 120, and because the petition stated conclusions rather than facts. Upon return of the case to the circuit court an amended petition and the ordinances and resolutions upon which the action was founded were filed, which corrected the defects pointed out in the first opinion.

We have now confronting us the question of whether or not a third class city operating under a commission form of government which has abolished under KRS 89.040 all nonelective offices, including that of city attorney, can then under a civil service ordinance pursuant to KRS 90.300 to 90.990 appoint a city attorney in the guise and under the name of an employee so that he may be perpetuated in office. The theory upon which it is contended that this can be done is that as an employee who has a portion of his salary deducted and placed in the pension fund, along with a tax levied for that purpose, he has an inviolable contract with the city under KRS 90.410, which cannot be affected by a repeal of the civil service ordinance.

The answer to this question requires us to determine whether or not the appointment of a city attorney under the civil service ordinance made him an officer or an employee of the city, since an officer can have no vested right in the office he holds while an employee does have a vested right in the position he holds under the civil service ordinance. In this country offices are not held by grant or contract but are created by the law-making power and no person has a vested right in them. 2 McQuillin Municipal Corporations, 2d Ed., § 514, p. 235; Taylor v. Beckham, 178 U.S. 548, 20 S.Ct. 890, 44 L.Ed. 1187; Gregory v. Kansas City, 244 Mo. 523, 149 S.W. 466. This seems to be the general rule and in the notes to the section just cited Judge McQuillin lists cases from 16 states and from the United States Supreme Court. Our case of Hobbs v. Upington, 121 Ky. 170, 89 S.W. 128, 28 Ky.Law Rep. 131, is not to the contrary, but only holds that an officer after being inducted cannot be illegally ousted from office during the time for which he was elected.

While an office established by the Constitution may not be abolished by the General Assembly, yet one established by statute may be abolished by statute. Standeford v. Wingate, 64 Ky. 440; Board of Councilmen v. Brawner, 100 Ky. 166, 37 S.W. 950, 38 S.W. 497, 18 Ky.Law Rep. 684; Board of Aldermen of the City of Ashland v. Hunt, 284 Ky. 720, 145 S.W.2d 814, 821. Since the General Assembly created the office of city attorney in cities of the third class, it cannot be doubted that under these authorities it had the right to abolish it, thus leaving such cities to secure counsel by contract. In abolishing that office by KRS 89.040 no provision seems to have been made for a city attorney and certainly KRS Chapter 89 authorizing a commission form of government in cities of the third class did not affect the duties of city attorney as they were not mentioned.

It is provided in KRS 89.020 that all laws, applicable to and governing cities, by-laws, ordinances and resolutions not inconsistent with Chapter 89, KRS, shall continue in force until altered or repealed in the manner provided for in that chapter.

Therefore, that part of KRS 69.480 providing the city attorney must be a qualified voter of the city and shall have been a licensed practicing attorney for five years, and shall not be a stockholder, officer, agent, attorney or employee of any corporation or person holding a franchise under or with the city, seems to have been left intact. Certainly, KRS 69.490 fixing his duties as general law officer of the city, and KRS 69.500 relative to his salary, were not repealed by the General Assembly in passing KRS 89.040, because, as we said in Calhoun v. Jett, 192 Ky. 383, 233 S.W. 794, if the General Assembly had intended to abolish the qualifications, duties and salary of the city attorney, it would have been an easy matter for it to have so said.

Thus, it appears that the General Assembly abolished the office of city attorney in name only. In City of Lexington v. Thompson, 250 Ky. 96, 61 S.W.2d 1092, we expressly held that the Gen-

eral Assembly could not convert the office of city manager into a position of employment merely by designating him as an employee, when as a matter of fact he possessed the attributes of an officer. Likewise, the General Assembly may not convert the office of city attorney into that of an employee merely by calling the city attorney by the latter name while leaving all his qualifications and duties those of an official.

The line of demarcation between public office and public employment is oftentimes dim and the distinction between them as marked by judicial expression is not always clear. 42 Am.Jur., Public Officers § 12, p. 889; People ex rel. Dawson v. Knox, 267 N.Y. 565, 196 N.E. 582; Alvey v. Brigham, 286 Ky. 610, 150 S. W.2d 936, 135 A.L.R. 1024; Annotations, 93 A.L.R. 333. However, we have had but little difficulty in deciding the question on the facts in this record. In making the distinction between an official and an employee, certain differences in the status of the two were pointed out in Lexington v. Thompson, 250 Ky. 96, 61 S.W.2d 1092, which recites that it took them from State v. Hawkins, 79 Mont. 506, 257 P. 411, 53 A.L.R. 583, and we will not again set them out here. It will suffice to say that a public office is created by law and the incumbent is usually required to be an inhabitant of the political unit he serves; the powers conferred and the duties to be performed must be defined directly or impliedly and they must be continuing in their nature and not occasional or intermittent; and the powers thus conferred must be a portion of the sovereign power of government to be performed for the public benefit. On the other hand, a public employment is a position which lacks one or more of the foregoing elements.

The city attorney is made the general law officer of the city under KRS 69.490, and in City of Bowling Green v. Gaines, 136 Ky. 562, 96 S.W. 852, 853, 29 Ky.Law Rep. 1013, we said, "It is his duty to attend to all legal business of the city, except prosecutions in the police court." In so doing he is exercising a sovereign power for the benefit of the public. That part of KRS 69.480 requiring him to be a qualified voter of the city and a licensed practicing attorney for five years was unaffected by KRS 89.040, as were the whole of KRS 69.490 and 69.500 relating to his duties and salary. While the office was abolished in name, in effect it was not abolished. The city attorney still remained the general law officer of the city and his qualifications remained the same and he took the oath required of all officers by § 228 of our Constitution. The fact that the civil service ordinance referred to him as an employee no more makes him such than did the Act of the General Assembly applicable to the Lexington case make Thompson an employee when in fact he was an official. The Attorney General is the chief law officer of this State and

if the Legislature should abolish the title to his office but leave his qualifications and duties the same and call him an employee of the State, his status would not be changed from that of an official to an employee.

We notice that the board of examiners under the civil service ordinance stated that they had given an examination to the city attorney they called an employee and that he had passed same. It strikes us as being rather puerile for a board of laymen to say they have examined a city attorney and that he passed their examination, unless it be that they found he possessed the qualifications of an official as required by KRS 69.480. It may be helpful to public service to put employees under the merit system, usually referred to as civil service, but that statute should not be extended to officers under the guise that they are employees for the all too apparent purpose of perpetuating them in office

We are of the opinion that the General Assembly in authorizing cities of the third class to organize under a commission form of government did not abolish the office of city attorney and that such office has not become one of employment merely because the civil service ordinance referred to it as such. The chancellor should have entered a judgment to the effect that the city attorney is an officer and not an employee and does not come within the provisions of the civil service ordinance.

The judgment is reversed.

A. SELECTION AND TENURE—STATUS

At the county level one is likely to find public offices created or recognized directly by the state constitution. In some instances the organic law freezes the methods of selection and terms of county offices. If there are any similar provisions concerning officers of municipalities and ad hoc agencies, however, they are quite rare. For the most part, then, both the existence of a local office and such matters as selection and tenure are regulated by statute or home rule charter.

The short ballot and centralized policy-making and administrative responsibility in local government have gained substantial recognition, but not on a scale to please advocates of those reforms. Certainly, it is still the case in many large communities that the average voter will have no real information about the candidates for the numerous offices listed on his ballot. Such a condition is the habitat in which the ward politician, who opposes reform, thrives.

Under the manager plan, exemplified by the Model City Charter, we have a small elective governing body presided over by a mayor of its own selection, who has little else but ceremonial responsibilities to discharge. The council appoints a city clerk and the city manager. The city manager is the executive head of the municipal government. He appoints the department heads. The officers already listed together with a limited number of top ranking assistants, temporary personnel and unskilled workers form the unclassified service. The classified service, comprising all other positions, is manned on a merit basis.

De WOODY v. UNDERWOOD

Court of Appeals of Ohio, Summit County, 1940. 66 Ohio App. 367, 34 N.E.2d 263.

Washburn, P. J. This is an action for a declaratory judgment as to the rights and status of Leonard M. Bertsch in reference to the position of civil service commissioner of the city of Akron, Ohio.

The trial court determined that Leonard M. Bertsch is not a member of said civil service commission, and the controversy is before this court upon Leonard M. Bertsch's appeal on questions of law.

The facts are not in dispute.

The term of Aldrich B. Underwood as a member of said commission expired on December 31, 1939, and, as provided by the charter, only a Democrat could be selected to succeed him.

The charter provided for a nominating committee consisting of the president of the Akron University, the superintendent of schools, and the presiding judge of the Common Pleas Court "at the time the vacancy . . . occurs." The charter further provided that said committee should nominate three electors for such vacancy, and that "from such group of three nominees the mayor shall, with consent of council, appoint one to fill" such vacancy.

At the time of the expiration of Underwood's term on December 31, 1939, one member of said designated committee—the presiding judge of the Common Pleas Court—was just completing his term of service as presiding judge, and he was succeeded in that office by another Common Pleas judge on January 2, 1940.

The mayor notified the committee some time between January 3 and January 31, 1940, that the term of a civil service commissioner had expired on December 31, 1939, and at the time of such notification and when the subsequent nominations were made, the new presiding judge was one of said committee, the other two

members being individuals who both before and after December 31, 1939, were members of said committee.

The question is raised as to whether the new presiding judge was qualified to act as one of the committee on nominations.

Our view is that that is not a matter of very great importance, because there were two members of the committee who were admittedly qualified to act; and, in the absence of some special provision, the general rule that the majority of a committee may function as such, would apply.

When a person by appointment to an office for a fixed term and until his successor has been "appointed and qualified" is discharging the duties of the office after the expiration of the fixed term, and the appointing power is not authorized to appoint his successor until three persons have been nominated, a vacancy in the office does not occur, within the meaning of that term as used in said charter, until such nominations have been made.

We construe the language in the charter which provides for the personnel of said committee "at the time the vacancy in the civil service commission occurs" to mean that the individuals who are members of the committee at the time they are called upon to make nominations, are qualified to make the nominations.

The nomination of two Democrats and one Republican when three Democrats only should have been nominated, is, of course, an irregularity, but where no objection is made and one of the Democrats nominated is appointed by the mayor, such irregularity does not affect the legality of the appointment.

On February 4, 1940, the committee notified the mayor of its nomination of Aldrich B. Underwood and Leonard M. Bertsch (Democrats) and Robert R. Jones (Republican), and on February 5, 1940, the mayor appointed Leonard M. Bertsch to the position of civil service commissioner, and on February 6, 1940, the council duly confirmed such appointment. On February 8, 1940, the mayor in writing notified Leonard M. Bertsch of his appointment, and on the next day Leonard M. Bertsch, in a writing addressed to the mayor, accepted said appointment. On February 10, 1940, Bertsch took the oath of office as civil service commissioner, and entered upon the discharge of the duties of the office.

On February 13, 1940, which was the day of the next regular meeting of the council after said confirmation, a member of the council who had voted in favor of such confirmation, made a motion "that said confirmation of Leonard M. Bertsch be reconsidered by the council"; and it is stipulated in the record herein that "upon reconsideration, the said Leonard Bertsch failed to receive confirmation by the council."

The record discloses that the rules of council provide that any action of the council may be reconsidered at the next regular meeting after such action upon the motion of a councilman "who voted with the prevailing side."

The record does not disclose any other rule, ordinance or resolution of the council, or provision of the charter, affecting the power of the council to withdraw its consent to an appointment.

The general rule established by the weight of authority is that an appointment once made and received by the appointee is irrevocable and not subject to reconsideration. This is especially true as to executive appointments, and applies whether the appointment is made by a collective body or by a single executive.

There are cases holding that if the collective body authorized to make the appointment is a legislative body, the act of appointment being intrinsically administrative or executive, the body has no more power to reconsider and revoke the appointment than an executive has, and that if its action is publicly declared, it cannot be rescinded or revoked by reconsideration.

There are also cases which hold that a legislative body, in making the appointment, acts in a legislative capacity, and that the legislative body may, under its rules applying to legislative acts, reconsider and rescind the appointment at any time within which, in accordance with its rules, it may reconsider its ordinary legislative acts. Other cases hold that it cannot so reconsider, if the appointment has been regularly completed and the appointee has qualified.

Where the appointment is to be made by an executive with the consent of a legislative body, there is a difference of opinion in the various cases as to whether, in giving consent, the legislative body acts in a legislative or executive capacity, and, if legislative, when and under what circumstances the legislative body may reconsider and withdraw its consent once given, where, under the rules of the legislative body, it may reconsider and change its ordinary legislative acts.

We have considered many of the cases mentioned in the annotation on this general subject found in 89 A.L.R., 132 to 163, and other cases, and are of the opinion that the weight of authority justifies us in holding that—

Where the law requires an appointment to official position to be made by an executive "with the consent" of a legislative body, and such consent is regularly given by what may be considered as legislative action, and the executive, acting upon such consent, notifies the appointee in writing of his appointment, and the appointee in writing accepts the appointment and qualifies for the position by taking the oath of office and entering upon the discharge of the duties thereof, such legislative body cannot thereafter reconsider its action and withdraw such consent, even though within the period during which its rules permit reconsideration of its ordinary legislative acts. United States v. Smith, 286 U.S. 6, 76 L.Ed. 954, 52 S.Ct. 475.

The trial court was in error in declaring that Leonard M. Bertsch is not a member of the civil service commission of the city of Akron, and said judgment is reversed, and a judgment declaring that he is a member of such commission may be entered.

Judgment reversed, and judgment for appellant.

Nepotism has been proscribed, in at least one instance, by constitutional provision. In Missouri the constitution ordains that any public officer of employee "in" the state who, by virtue of his position, names or appoints to public office or employment any relative within the fourth degree shall forfeit his office. Mo. Const. of 1945, Art. VII, § 7. This provision, which is a carry-over, with modifications, from an earlier constitution, is self-executing. It applies, for example, to the case of mayor who appoints his first cousin to the position of pumper in the municipal water system. State ex inf. Ellis, Pros. Atty., ex rel. Patterson v. Ferguson, Mayor, 333 Mo. 1177, 65 S.W.2d 97 (1933), certio-rari denied Ferguson v. State of Missouri ex inf. Ellis, 291 U.S. 682, 54 S.Ct. 559 (1934).

A constitutional provision making a period of residence a qualification for public office may unduly constrict the field if the position of city manager or personnel director, for example, is to be deemed an office. An amendment to the home rule charter of St. Louis set up a department of personnel headed by a director of personnel. It was provided that the director need not be a resident of the city. In a test case the Supreme Court held that the position was a public office and that persons who did not meet the constitutional residence requirement could not be considered for the post. Kirby v. Nolte, 349 Mo. 1015, 164 S.W.2d 1 (1942). This, doubtless is the background of an exception to the constitutional requirement, added in 1945, with respect to administrative positions "requiring technical or specialized skill or knowledge". Mo.Const. of 1945, Art. VII, § 8.

STATE V. GARDNER

Supreme Court of Ohio, 1896. 54 Ohio St. 24, 42 N.E. 999.

BRADBURY, J. At the September term of the court of common pleas of Summit county, Omar N. Gardner was indicted for offering a bribe to Joseph Hugill. a city commissioner of the city of Akron. The accused demurred to the indictment on the ground that the act of April 20, 1893, under which Hugill was performing the duties of his office. was unconstitutional and void. murrer was sustained, and the defendant discharged. To this holding of the court the prosecuting attorney excepted, and by virtue of the provisions of sections 7305-7308 of the Revised Statutes has brought the question to this court for review. Two questions are presented by the record: (1) Whether the act of April 20, 1893, which provides a municipal government for the city of Akron, is unconstitutional or not; and (2) if unconstitutional, whether its constitutionality may be assailed in the collateral way undertaken by the accused.

The first question which logically arises is the latter of the two. for, if the accused should not be allowed to raise the question in the way he attempted, it follows that the constitutionality of the act which created the office was not before the court. Whether an act of the general assembly creating an office and providing a method for filling it may be collaterally attacked is a question of the utmost importance in the practical administration of governmental affairs. Different courts have decided the question differently. Leach v. People, 122 Ill. 420, 12 N.E. 726; Burt v. Railroad Co., 31 Minn. 472, 18 N.W. 285; Coyle v. Com., 104 Pa.St. 117: Mechem. Pub.Off. §§ 318, 327: Van Fleet, Collat. Attack, p. 33, § 21; Norton v. Shelby Co., 118 U.S. 425, 6 S.Ct. 1121; Hildrith's Heirs v. McIntire's Devisees, 1 J.J.Marsh. 206. It is now before this court for the first time, and, while we are not insensible to the consideration justly due to the high standing of those courts and authors, we are bound to reach that conclusion which, in our judgment, is best sustained by sound reason, and that best comports with an enlightened public policy and the maintenance of public order.

If the official acts of officers, acting in an office created by an unconstitutional statute, should be regarded as falling within the principle that sustains the acts of de facto officers, until the statute has been held unconstitutional by competent judicial authority in a proceeding appropriate to that end, all difficulty vanishes. The opposite doctrine is based upon the assertion that there can be no de facto officer unless there is a de jure office. That is a

simple and summary way to dispose of this grave question. That there can be no de jure officer without a de jure office is a proposition to which all minds will, of course, assent. But that there can be a de facto officer without a de jure office is disputable, if the phrase "de facto officer" includes one who in fact discharges the duties of a public office, recognized by the great body of the people and by virtue of a statute solemnly passed by the general assembly of the state, which may be unconstitutional. That there have been many officers who occupied and discharged the duties of offices created by laws that were afterwards held unconstitutional is a fact well known to every one. While in such occupancy, innumerable official acts affecting both public and private rights may have been actually performed by them. The duration of the office may, and often does, extend through a series of years. In the case before us the act in question is one creating a municipal government for the city of Akron, and has been in force since its enactment in April, 1893. It superseded an act, passed in the year 1891, for the government of that city, which latter act was subject to the same assault that was attempted to be made on the one under consideration. The existing government of the populous and thriving city of Youngstown also rests upon the act now assailed, while that of the city of Springfield depends upon an act at least as vulnerable to the same attack as the act under consideration. The constitutionality of the governments of the cities of Springfield and Youngstown have not been assailed, even collaterally, and may continue unchallenged for many years. The officers in these cities occupy offices created by the acts upon which the city government rests and are daily discharging duties affecting the rights of the city and the private rights of individuals. These officers are either usurpers and trespassers or de facto officers. If the latter, the rights of the public. or of individuals who have submitted to their authority or acquiesced in its exercise, would be unaffected by a subsequent authoritative judicial declaration that the statute was unconstitutional. If they were usurpers merely, every official act would be a nullity, and interminable confusion possibly follow, such a decision. Were such results to follow, the courts might well pause before declaring unconstitutional an act establishing a city government, unless its constitutionality was challenged upon the threshold of its existence.

The common law in relation to de facto officers had its origin in England, it was there laid upon a foundation as broad as their necessities required. Such a thing as a written constitution controlling legislative action was unknown to their jurisprudence. Whatever office parliament chose to create was a de jure office.

In the states of the American Union, however, we find written constitutions, limiting the otherwise absolute power of the people to act through the legislative branch of the government. As a consequence of this peculiar feature of our government, a statute regularly enacted by the legislative branch thereof may, in express terms, create a public office, or it may authorize a municipal corporation to create one. An incumbent may be appointed in the mode prescribed by the statute. He may qualify, enter upon the discharge of the duties of the office, and continue to discharge those duties indefinitely,—possibly for many years, during which he daily performs official acts affecting not only public rights, but private rights of the most sacred character. After all this has occurred, the constitutionality of the statute is successfully challenged, and the statute declared void, and for the first time in the history of the common law its principles must be invoked to ascertain the status of the rights of persons and of the public that accrued before the law was declared void. We think that principle of public policy declared by the English courts three centuries ago, which gave validity to the official acts of persons who intruded themselves into an office to which they had not been legally appointed, is as applicable to the conditions now presented as they were to the conditions that then confronted the English judiciary. We are not required to find a name by which officers are to be known who have acted under a statute that has subsequently been declared unconstitutional, though we think such officers might aptly be called "de facto officers." They actually performed official acts authorized by a statute solemnly enacted by the lawmaking department of the government. Such a statute is presumed to be constitutional. Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton Co., 1 Ohio St. 77. broken current of authority supports this proposition. Courts, in the practical administration of justice, should regard the substance of things, and deal with conditions as they actually exist. Here are grave and important official acts actually performed by virtue of an office created under the provisions of a statute regularly enacted by that branch of the government to which the power to make law has been delegated by the constitution. There is a clearly established legal presumption of its validity. The public in its organized capacity, as well as private citizens, has acquiesced in and submitted to their authority. Such circumstances, the majority of the court are of opinion, are sufficient to give such color to their title as to make them de facto officers. But whether they fall within the previously existing definition of such officers or not, their official acts thus performed fall within the protection of that principle of public policy which defends them against collateral attack, and that, therefore, the question of the

constitutionality of the statute in question was not before the court of common pleas. Exceptions sustained.²

In the Gardner case collateral attack on constitutional grounds was rejected. A recent Minnesota case presented the situation where, after a statute establishing a municipal court had been declared unconstitutional on direct attack by the state, collateral attack was made upon a judgment of the court rendered prior to the determination of constitutionality. Marckel Co. v. Zitzow, 218 Minn. 305, 15 N.W.2d 777 (1944). The de facto doctrine was applied. The opinion of the court, prepared by Justice Youngdahl, is, in part, as follows:

"It is defendant's position that the judgment is invalid because of the fact that there can be no de facto court without a de jure court and a de jure office. Plaintiff, on the contrary, asserts that, even though the law was invalid and unconstitutional, there existed a de facto court antecedent to the time the law was stricken down and that proceedings conducted in said court during that time are valid. Some courts have taken a positive position in support of the doctrine that there may be a de facto court under these circumstances. Others, just as emphatically, have taken a stand to the contrary. These decisions are irreconcilably in conflict.

"But we are not without precedent in our own jurisdiction. The theory that there may be a de facto court antecedent to the time the law creating the court is declared unconstitutional has become settled policy in this state since the issue first came before the court in Burt v. Winona & St. P. R. Co., 31 Minn. 472, 18 N.W. 285, 289. Even though in the Burt case the primary issue was whether a collateral attack could be made, nevertheless the court took a definite stand on the issue here considered, as appears from the statement of Mr. Chief Justice Gilfillan, speaking for the court, as follows (31 Minn. 477, 18 N.W. 287):

"'We need not in this case attempt a definition to cover all instances of a court or office de facto. It is enough to determine upon the particular facts of this case. But we may go so far as to lay down this proposition, that where a court or office has been established by an act of the legislature apparently valid, and the court has gone into operation, or the office is filled and exercised under such act, it is to be regarded as a de facto court or office. In other words, that the people shall not be made to suffer because misled by the apparent legality of such public institutions.'

² The concurring opinion of Spear, J., and the dissenting opinion of Shauck, J., are omitted.

"The rationale of the cases supporting this doctrine is that it is necessary to protect those who deal with officers apparently holding office under a valid law and in such manner as to warrant the public in assuming that they are officers in fact. In dealing with them as such, the law validates their acts as to the public and third persons on the ground that as to them, although not officers de jure, they are officers in fact, whose acts necessitate and reason require to be considered as valid. This was substantially the reasoning adopted by our court in the Burt case when it further said (31 Minn. 476, 18 N.W. 287):

'. . . It would be a matter of almost intolerable inconvenience, and be productive of many injustices, of individual hardship and injustice, if third persons, whose interests or necessities require them to rely upon the acts of the occupants of public offices, should be required to ascertain at their peril the legal right to the offices which such occupants are permitted by the state to occupy.'

"Those supporting the contrary doctrine insist that "The idea of an officer de facto presupposes the existence of a legal office' and 'there cannot be an officer de facto unless there is a legal office, so that there might be an officer de jure.' See dissent of Mr. Justice Mitchell in Burt v. Winona & St. P. R. Co., supra. They argue further that 'An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.' Norton v. Shelby County, 118 U.S. 425, 426, 6 S.Ct. 1121, 1125, 30 L.Ed. 178. Eminent jurists have written in support of this doctrine. More particularly the Norton case, in which the opinion was written by Mr. Justice Field. has become one of the leading cases in support of that theory.

"While we are not unmindful of the respect and consideration rightfully due the courts and authorities supporting this position, we are committed to the opposing doctrine, which, in our judgment, is best sustained by sound reason, is most consistent with an enlightened public policy, the maintenance of public order, and the practical administration of justice. Simply to suggest that there cannot be a de facto court without a de jure court and a de jure office to fill, seems to us too much of a verbal distinction and too summary a way to dispose of a question with such far-reaching implications. Important official acts were actually performed by the judge of the court created under a statute apparently regularly enacted by the branch of the government to which the power to make laws has been delegated by the constitution. The acts of the incumbent were as potent, as far as the public is concerned, as were the acts of

any de jure officer performing a duty of a legally existing office. The public, in its organized capacity, as well as private citizens, has acquiesced in and submitted to its authority. Under those circumstances, it appears to us that to suggest that, because there cannot be a de facto court without a de jure court, all such acts are invalid is too hypercritical a refinement and one which should have no support in law or reason. In a situation such as is presented here, the courts, in the practical administration of justice, should not be bound by abstract dogmas or fine theoretical distinctions, but rather, in the spirit of realism, should be prompted by considerations of necessity, convenience, and public good." ³

Can a de facto officer on body appoint a de jure officer? In 1936 the New Jersey Court of Errors and Appeals said "no". Von Nieda v. Bennett, 117 N.J.L. 231, 187 A. 629, 106 A.L.R. 1320 (1936). An earlier case to the contrary, Brinkerhoff v. Jersey City, 64 N.J.L. 225, 46 A. 170 (1900), was expressly overruled. Contra: State ex rel. James v. Deakyne, 58 A.2d 129 (Del.Super. 1948). See also State ex rel. Roush v. Board of Education of Mason County, 128 W.Va. 150, 35 S.E.2d 850 (1945).

Is the defense against collateral attack stronger where the act of a board or body of which the particular officer is serving as a member, and not his individual act, is under fire? In Tennessee there survives a county governing body, the quarterly court, which preserves with amazing fidelity the pattern of the old English court of quarter sessions. The quarterly court is made up of the justices of the peace of the county. meeting of the quarterly court of Hamilton County in April, 1940, a resolution to accept a bid for the sale of voting machines to the county failed by a tie vote. The bidder maintained, in a declaratory judgment proceeding, that the resolution passed. The theory was that the negative of a member from one district should not have been counted since, as it was contended, the law creating his office had been repealed by implication. Collateral attack was rejected. Shoup Voting Machine Corp. v. Hamilton County, 178 Tenn. 14, 152 S.W.2d 1029 (1941). Mr. Chief Justice Green, for the court, said, in part:

"Complainant urges that the Act of 1917 abolished the office of justice of the peace for the municipality of Chattanooga and submits that where there is no *de jure* office there can be no *de facto* officer filling it. It was so held in Ruohs v. Athens, 91 Tenn., 20, 18 S.W., 400, 30 Am.St.Rep. 858, and this is repeated in Davis v. Williams, 158 Tenn., 34, 12 S.W.2d 532. It

³ The case is discussed in 29 Minn.L.Rev. 36 (1944).

should be noted that in so far as a judicial officer is concerned in Beaver v. Hall, 142 Tenn., 416, 217 S.W. 649, this court refused to apply the doctrine of Ruohs v. Athens and the authority of Ruohs v. Athens was considerably weakened by the later decision.

"The argument made for complainant would be more persuasive if the matter involved were some act done by Langley alone as a justice of the peace. The matter involved, however, is an act of the quarterly county court of Hamilton County and of course there is a *de jure* quarterly county court of that county. The real question, therefore, is whether a third party can made (sic) a collateral attack on the organization of a *de jure* tribunal, organized and functioning in a manner unquestioned and accepted by the public for more than twenty years. We think no such attack is permissible.

"If the whole of the authority exercised by the quarterly county court had been conferred by law on one officer, and some individual, not eligible to that office, had with public acquiescence, under color of right, exercised its functions over a period of years his acts as such official would be fully accredited. Heard v. Elliott, 116 Tenn., 150, 92 S.W., 764, and many decisions of this court there collected. For stronger reasons we think mere participation as a member, under such circumstances, in the functions of a duly constituted agency of government by one ineligible could not deprive such agency of the status of a defacto body.

This conclusion is fully supported by the decision of this court in State ex rel. v. Hart, 106 Tenn. 269, 61 S. W., 780. In that case, although two of a school board of three were ineligible to membership, nevertheless they were assuming, under color of right, with public acquiescence, to act as members of the board. The board was held to be a *de facto* organization whose acts were not subject to collateral challenge. A *mandamus* was issued requiring the county trustee to pay a warrant drawn on him for school purposes by such board."

The factor of board action received no such notice in City of Lawrence v. MacDonald, 318 Mass. 520, 62 N.E.2d 850, 161 A.L.R. 955 (1945). There the city collaterally attacked a license which the Department of Public Works of the commonwealth had granted to an oil company to construct a pipe line under a river which served as a source of water for the city. The license had been granted on December 15. One of the participating commissioners of the department, whose vote and signature were necessary to the grant, had submitted his resignation which the Governor had accepted effective "as of December 15." There was no evidence as to whether he per-

formed any other official act on that day. The court considered the resignation effective at the beginning of the fifteenth since the day was indivisible. Thus, the city had made out that the person concerned was not an officer *de jure*. The majority thought that this left the burden on the opposition to show that he was a *de facto* officer. The two dissenting judges insisted that the city could not sustain a collateral attack without showing that the person concerned was not even a *de facto* officer. Which view is more in harmony with the policy upon which the *de facto* doctrine is grounded?

The old fee system of compensating local officials is open to serious objection. The advantages of compensation on an adequate salaried basis are so obvious and so compelling that a certain dogmatism about the subject seems warranted. Yet, the fee system is far from dead, especially in county government. The situation becomes positively vicious where the compensation of a judge or prosecuting officer depends, even in part, upon the convictions obtained. In the case of the judge, at least, the practice violates due process of law. Tumey v. State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 50 A.L.R. 1243 (1927) (mayor, sitting as a magistrate, received as compensation the costs in criminal cases, which were assessed only where defendants were convicted). Hardly less repugnant to decent sensibilities is the system of allotting a sheriff or other officer. charged with the feeding of prisoners, a certain amount for the purpose and leaving him free to pocket any unused part of the allotment. The Missouri Constitution of 1945 has a pertinent provision, which bears quoting. (Art. VI. § 13).

Sec. 13. All state and county officers, except constables and justices of the peace, charged with the investigation, arrest, prosecution, custody, care, feeding, commitment, or transportation of persons accused of or convicted of a criminal offense shall be compensated for their official services only by salaries, and any fees and charges collected by any such officers in such cases shall be paid into the general revenue fund entitled to receive the same, as provided by law. Any fees earned by any such officers in civil matters may be retained by them as provided by law.

It will be seen that Missouri is emphatic about criminal law administration but does not proscribe the fee system in civil matters.

In some jurisdictions there are constitutional provisions regulating the compensation of public officers, which are broad enough to apply to local officers. The Kentucky constitutional ceiling on compensation has already been noticed in this chapter. A not unusual provision is the ban on payment of extra

compensation after services have been rendered. Such a clause has been invoked against pension and retirement plans. In rejecting that line of attack upon a county retirement plan the Supreme Court of Pennsylvania distinguished "pensions" as follows:

". . . A pension is a bounty or gratuity given for services that were rendered in the past. This act provides for retirement pay. Retirement pay is defined as 'adjusted compensation' presently earned, which, with contributions from employees, is payable in the future. . ." Retirement Board of Allegheny County v. McGovern, 316 Pa. 161, 174 A. 400, 404 (1934). Accord: State ex rel. Watson, Atty. Gen., v. Lee, State Comptroller, 157 Fla. 62, 24 So.2d 798 (1946).

Another familiar control is the prohibition upon increasing the salary of an officer during his term. Article 16, Section 3, of the Michigan Constitution is an example of a ban upon either increase or decrease. It is the prevailing opinion that, even without benefit of such a provision, an officer may not formally or informally, waive the benefit of a law establishing his compensation. For a wealth of cases see Notes 118 A.L.R. 1458 (1939); 127 A.L.R. 529 (1940); 160 A.L.R. 490 (1946). In Allen v. City of Lawrence, 318 Mass. 210, 61 N.E.2d 133, 160 A.L.R. 486 (1945), this view was applied to the case of cemetery laborers whose wages had been fixed by ordinance. prohibition does not, however, limit the power of the legislature or competent local authority to abolish an office. Williams v. City of New Bedford, 303 Mass. 213, 21 N.E.2d 265 (1939). Nor is it universally deemed applicable to local officers. Broadwater v. Kendig, City Treasurer, 80 Mont. 515, 261 P. 264 (1927) (Provision of legislative article of state constitution forbidding any "law" increasing or diminishing salary of a "public officer" "after his election or appointment" held inapplicable to a municipal officer, who was deemed to be governed, instead, by a statute forbidding a salary change "during his term of office.")

RECKNER v. SCHOOL DISTRICT OF GERMAN TOWNSHIP APPEAL OF SCHOOL DISTRICT OF GERMAN TOWNSHIP

Supreme Court of Pennsylvania, 1941. 341 Pa. 375, 19 A.2d 402, 133 A.L.R. 1254.

Suit in equity by Eric Reckner and others, in their own right and in behalf of any taxpayers of German Township, Fayette County, who desire to join, against the School District of such township and the directors thereof for an injunction against payment of salary to O. R. Younkin, secretary of the board, in excess of \$600 per year. From a decree granting a permanent injunction, defendant district appeals.

Affirmed. . .

DREW, JUSTICE. This appeal presents but one narrow question: May a director of a third class school district legally cast the deciding vote in favor of a resolution of the board increasing his own salary as secretary thereof? We are firmly convinced that he cannot, for it is well settled that no man should act officially in a matter involving discretion, where he is personally interested in the result.

On May 14, 1939, at a meeting of the board of directors of the School District of German Township, Fayette County, consisting of seven members as required by section 204 of the School Code of May 18, 1911, P.L. 309, 24 P.S. § 164, O. R. Younkin was elected secretary at an annual salary of \$600 to complete the unexpired term of a previous incumbent ending the first Monday of July, 1941. Despite the fact that this term had not yet concluded, the board on June 29, 1940, purported to "elect" Younkin as "full-time Secretary assuming all duties attached to the office for the year beginning July 1, 1940 and ending July 1, 1941, with a salary of \$2400.00 per annum." This motion was declared carried by a recorded vote of four in favor, including that of Younkin himself, and three opposed. Within a month thereafter, plaintiffs, taxpayers of the School District, presented their bill in equity to the court below for injunctive relief against the School District and the directors individually, parties defendant, to restrain the payment to Younkin of any salary in excess of \$600 per year under the resolution in question. An answer was filed on behalf of the School District. After a hearing, the Chancellor entered a decree nisi dismissing the bill. Exceptions thereto, however, were sustained by the court en banc, and a final decree was entered granting the permanent injunction prayed for. Thereupon the School District appealed.

The School Code is silent on the question here presented. Section 303, as amended, 24 P.S. § 214, provides that in school districts of the third and fourth classes the secretary may be a member of the board, and it is also provided, by section 323, as amended, 24 P.S. § 280, that he may receive for his services such compensation as the board shall fix; but a thorough study of the statute fails to reveal any indication whatsoever that it was the legislative intent to abrogate the well-founded and long-established public policy that one who has a direct personal interest in a matter under consideration by a representative

public agency of which he is a member is disqualified from voting thereon, and if his vote is determinative, the action taken is void.

In Commonwealth v. Raudenbush, 249 Pa. 86, 94 A. 555, Ann.Cas.1917C, 517, this Court held that a councilman could not legally cast the deciding vote in favor of accepting his own resignation so that he might be employed by the city in a salaried position. It was there said (249 Pa. pages 88, 89, 94 A. page 555, Ann.Cas.1917C, 517): "We are of opinion that Raudenbush could not vote for the acceptance of his own resignation which, therefore, never became effective. In 28 Cyc. 337, citing numerous authorities to sustain the text, it is said: 'There is a general rule of law that no member of a governing body shall vote on any question involving his . . . pecuniary interest, if that be immediate, particular and distinct from the public interest.' . . . It is against public policy for a representative of a municipality to vote in its legislative body on any matter which affects him individually. . . . a trustee for the municipality and he may not deal with himself in any matter which concerns it. His cestui que trust has the right to his best judgment in everything that appertains to its business or welfare, unaffected and unprejudiced by anything which might inure to his own interest as an individual."

Section 403 of the School Code, 24 P.S. § 334, provides: "The affirmative vote of a majority of all the members of the board of school directors in every school district in this Commonwealth, duly recorded, showing how each member voted, shall be required in order to take action on the following subjects:—

. . . Fixing salaries or compensation of officers, teachers, or other appointees of the board of school directors." Obviously, this provision merely fixes the number of votes necessary for action on the specified subjects. It does not determine eligibility to participate in such action.

Far from being persuasive of Younkin's right to vote himself the increased salary, the failure of the Code specifically either to authorize or to forbid the practice is conclusive against him. It necessitates an explicit direction on the part of the legislature to overthrow such a wholesome and salutary rule of the common law as that precluding a public servant from simultaneously representing both himself and his constituents. As pointed out in Goodyear v. Brown, 155 Pa. 514, 518, 26 A. 665, 666, 20 L.R.A. 838, 35 Am.St.Rep. 903: ". . . it does not follow that everything may be done by a public officer that is not forbidden in advance by some act of assembly."

The decree is affirmed; costs to be paid by appellant.

An officer who has been wrongfully excluded from his office is usually considered to be entitled to the salary attached to the office for the period of wrongful exclusion, and that without offset for any amounts earned or "earnable" while ousted. The theory goes that the stipend is an incident to the office. The "rule of avoidable consequences" is likely to be applied, however, if the court concludes that the claimant is an employee. State ex rel. Dresskell v. City of Miami, 153 Fla. 90, 13 So.2d 707 (1943); Race v. Humphrey, 301 Ky. 10, 190 S.W.2d 686 (1945); Notes 53 A.L.R. 924 (1928) and 150 A.L.R. 100 (1944).

While it is the prevailing opinion that a de facto officer's suit to recover compensation may be successfully defended by showing his want of "title" to the office there is authority that such a party, who has acted in good faith, may recover if there is no officer de jure. The cases are collected in Notes 93 A.L.R. 258 (1934) and 151 A.L.R. 952 (1944). If the compensation attached to an office has been paid to a de facto officer the de jure claimant may not ordinarily require payment to him also. McKinley v. City of Chicago, 369 Ill. 268, 16 N.E.2d 727 (1938); Notes 55 A.L.R. 997 (1928) and 163 A.L.R. 760 (1946). The decided cases strongly support the right of a de jure officer to recover from a de facto officer such compensation as has been paid the latter. See Joseph Jarrett, "De Facto Public Officers: the Validity of Their Acts and Their Rights to Compensation" 9 So.Cal.L.Rev. 199, 231 (1936).⁴ A minority position is taken in Tennessee, where the policy against double payment by the government is overridden. State v. Scott County, 181 Tenn. 665, 184 S.W.2d 20 (1944); McMillan v. Shipp, 180 Tenn. 290, 174 S.W.2d 469 (1943). The Delaware case which follows is a rather extreme application of the conventional view.

WALKER v. HUGHES

Supreme Court of Delaware, 1944. 42 Del. 447, 36 A.2d 47, 151 A.L.R. 946.

LAYTON, CHIEF JUSTICE. The plaintiff sued in assumpsit to recover from the defendant the amount of salary incident to the office of County Comptroller for Kent County which had been paid to and accepted by the defendant during the time of his alleged wrongful possession of the office.

The special count of the declaration alleged that between January 7, 1941, and April 1, 1943, the Levy Court of Kent County,

⁴ There may be a question as to whether the de facto officer should be allowed an offset to the extent of the normal expenses incurred in "earning" the compensation. Albright v. Sandoval, 216 U.S. 331, 30 S.Ct. 318 (1910).

believing that the defendant had been duly elected to the office of County Comptroller for Kent County at the general election held on November 5, 1940, for the term of four years beginning on January 7, 1941, and was entitled to the salary appertaining to the office, paid to the defendant from the monies of Kent County the total sum of \$4,397.63 as the salary due to the duly elected holder of the office for the period between January 7, 1941, and March 16, 1943, which amount the defendant received and accepted as the salary appertaining to the office for the stated period: that thereafter the Superior Court of Kent County, constituting the Board of Canvass for the election, as directed by order of the Supreme Court, on March 11, 1943, recanvassed the votes given at the election for the office of County Comptroller and ascertained that the plaintiff has been duly elected to the office for the statutory term beginning on January 7, 1941, and issued to him a certificate of election, at the same time rescinding the certificate of election theretofore issued to the defendant; and that, thereupon, the plaintiff duly qualified, entered into and now occupies the office; wherefore, the defendant became liable to pay to the plaintiff and in consideration thereof promised to pay to him the sum of \$4,397.63 received as the salary of the office.

The defendant pleaded specially averring that the defendant had been duly elected County Comptroller for Kent County at the general election held in November 1936 for the statutory term, and a certificate of election had been issued to him pursuant to which he qualified for the office by taking the required oath and giving bond; that on the first Tuesday in January 1937. he entered upon and duly performed all the duties and obligations pertaining to the office up to and including March 16, 1943: that no other person qualified for the office, nor performed its duties and obligations during the stated period; that on March 11, 1943. the Superior Court for Kent County, constituting the Board of Canvass for the general election held in November, 1940, issued a certificate of election certifying that the plaintiff had been elected to the office of County Comptroller, and thereafter, on March 16, 1943, the plaintiff for the first time sought to and did qualify for the office by taking the required oath and giving bond. and it was not until then that the plaintiff entered upon or sought to perform any of the duties and obligations of the office.

The plaintiff demurred generally.

The root of the controversy was the constitutionality of Chapter 39, Volume 21, Delaware Laws, approved June 25, 1898. The provisions of this act were incorporated in the Code of 1935 in Article 4 of Chapter 60, and the act is generally referred to as the Soldiers' Vote Act.

In State v. Lyons et al., 1 Terry 77, 5 A.2d 495, the Court of General Sessions for New Castle County had before it the question of the constitutionality of Chapter 103, Volume 33, Delaware Laws, appearing in the Code in Article 5 of Chapter 60, and known as the Absentee Voters Act. Lyons and others were indicted for conspiring to abet fraud in connection with the casting of votes under the provisions of that act at the general election held in New Castle County in November, 1938. The defendants moved to quash the indictment on the ground, inter alia, that the act was unconstitutional for the reason that the legislature was without power to enact a statute authorizing the casting of ballots by persons who were not personally present at the polling places on election day. The debates in the Constitutional Convention of 1897 with respect to the Article V of the Constitution, headed "Elections", were carefully examined, and from the debates and other provisions of the Article providing for the challenging of electors offering to vote it was held that no power existed in the Legislature to provide for absentee voting. This decision was rendered on April 12, 1939, and at the time of the general election in 1940 constituted the whole of the decisional law in this State on the general question of absentee voting. At that election certain ballots of electors absent from their polling places in Kent County by reason of service in the armed forces of the United States were forwarded under the provisions of the Soldiers' Vote Act, and were before the Superior Court for Kent County, the constitutional Board of Canvass for the election in that County. Against the plaintiff's objection, and no doubt on the theory that the Court, sitting as a Board of Canvass, was without power to pass upon the constitutionality of the Soldiers' Vote Act, which was not directly before the Court in the Lyons case, these votes were counted, and counting them, it was ascertained that the defendant had received the highest number of votes cast for the office of County Comptroller for Kent County. Otherwise, the plaintiff would have received the highest number of votes cast for the office. A certificate of election was thereupon issued to the defendant.

Thereafter the plaintiff invoked the original jurisdiction of the Supreme Court to direct by mandamus the Superior Court for Kent County constituting the Board of Canvass for the election to re-canvass the vote cast at the election, especially for the office of County Comptroller; and in that action it was held that the Soldiers' Vote Act was unconstitutional and void, and an appropriate mandate was issued to the Board of Canvass. State ex rel. Walker v. Harrington et al., 3 Terry 246, 30 A.2d 688. Accordingly the Board of Canvass re-canvassed the vote cast at the general election held in November, 1940, for the office of County

Comptroller and the result was, as alleged both in the declaration and plea, an ascertainment that the plaintiff, and not the defendant, had received the highest number of votes cast for the office. A certificate of election was thereupon issued to the plaintiff, and an order entered rescinding the certificate of election theretofore issued to the defendant. The plaintiff qualified, and assumed the duties of the office.

The not unusual case is presented in which one whose right to a public office has been judicially determined seeks to recover from another in possession under color of title the emoluments of the office.

The great weight of authority supports the rule that the rightful incumbent of a public office may recover from an officer de facto the salary received by the latter during the time of his wrongful tenure, even though he entered into the office in good faith and under color of title. The reasons advanced in support of the rule are quite generally regarded as unanswerable. prevent embarrassment of the public service, disbursing officers, charged with the duty of paying official salaries, may rely on the apparent title of an officer de facto, and treat him as an officer de jure without further inquiry; and the payment of the salary to a de facto public officer in possession is a good defense to an action brought by the de jure officer to recover from the public the same salary after he has established his right to the office. But as between the de jure officer and the de facto officer, the emoluments of a public office are incident to the title and not to the possession even though colorable. A de facto officer is held bound to know the validity of his title, and he takes the salary of the office at his peril, as does one who, with a defective title, enters into possession of land and takes to his use the rents and profits. He must, therefore, account to the de jure officer for whatever amount of salary paid to him during the period of his wrongful possession. Resulting hardship to the de facto officer is obvious in many cases; but the rule is one of manifest soundness and utility in support of a wise public policy designed to discourage or prevent usurpation or wrongful retention of public offices. The need for establishing general regulations for the government of society overbalances the individual hardship oftentimes resulting to the de facto officer.

The defense offered by the plea is, that during the period from January 7, 1941, to March 16, 1943, when the plaintiff assumed the office, the defendant was an officer de jure under constitutional and statutory authority, and not merely a de facto officer.

Section 5 of Article XV of the Constitution provides that all public officers shall hold their respective offices until their suc-

cessors shall be duly qualified, except as otherwise provided; and the statute creating the office of County Comptroller for Kent County created a term of four years, or until a successor shall be duly qualified. Rev.Code, 1935, Ch. 46, Sec. 1 (section 1476).

The defendant, in his plea, tacitly admits the allegations of the declaration with respect to the general election held on November 5, 1940; but he seeks to avoid the force and effect of the averments by alleging that he was elected to the office at the general election held in November, 1936, and that from the time of his qualification therefor in January following the election until March 16, 1943, when the plaintiff first qualified, he alone had qualified for the office and none other than he had assumed and performed its duties and obligations. It is argued that during this period the defendant, under the Constitution and statute, held the office, not merely in fact, but as of right, and was entitled to take and hold the salary pertaining to the office during the stated period without liability to account therefor to the plaintiff, his successor.

The contention is patently invalid. Holding over provisions in constitutions and statutes are not uncommon; and apart from any constitutional or statutory regulation it seems to be the general rule of law that an incumbent of an elective office will hold over after the conclusion of his term until the election and qualification of a successor. 43 Am.Jur. 20.

The purpose of a holding over provision is to prevent a possible vacancy or interregnum in a public office where there is no properly qualified successor at the expiration of the usual statutory term, so that the public business will not be interrupted or subjected to doubt or dispute. State ex rel. Southerland v. Caulk, 3 W.W.Harr. 344, 138 A. 354. An elective officer holding over after the expiration of his term may or may not be accurately described as an officer de jure dependent on the circumstances. In a proper case he holds de jure in the full sense of the term and is entitled to the emoluments of the office as of right, as, for example, where there has been no election of a successor, or where a duly elected successor is disqualified to hold the office. But it will not be readily agreed that an elective officer retaining possession of the office after the conclusion of his term is necessarily and in all circumstances an officer de jure under the usual holding over provision even as against a duly elected successor possessing all of the qualifications for the office whose right to the immediate possession of the office is withheld through no default or neglect on his part. So to hold would extend the holding over provision far beyond its purpose; would tend to promote, not discourage, wrongful retention of public office; and would effectively deny the very principle on which is based the liability of a de facto officer to account to

the officer de jure for the emoluments of the office received by the former during the period of his wrongful occupancy.

The certificate of election first issued to the defendant following the canvass of the vote in November, 1940, conferred upon the defendant a prima facie title to the office, and justified the disbursing officers of the County in paying to him the stated salary of the office. But the certificate of election was but a muniment of title. 42 Am.Jur. 948. It was evidence of the result of the canvass, but did not determine the result of the election conclusively beyond the possibility of revision or reversal. plaintiff's right or title to the office was in esse as a result of the election as properly ascertained. His right to possess the office accrued on the first Tuesday in January, 1941, upon qualification therefor. At that time, prima facie, the defendant had title. The plaintiff was not obliged to make a formal but utterly vain offer to qualify in order to establish and maintain his right to the office which, however long postponed in actual enjoyment, existed and persisted, with the result that the defendant, from January 7, 1941, was never in possession of the office as of legal right. 42 Am.Jur. 969; 43 Am.Jur. 21; People v. Potter, 63 Cal. 127; People ex rel. Benoit v. Miller, 16 Mich. 56; Id., 24 Mich. 458, 9 Am. Rep. 131.

Moreover, it is clear enough that the defendant, on and after January 7, 1941, did not rest his right to continue in possession of the office on the holding over provisions of the Constitution and statute. The result of the election held in November, 1940, was at first determined in the defendant's favor. By necessary implication he had been a candidate for re-election to the office. certificate of election was issued to him by the Board of Canvass. He accepted from the Levy Court of Kent County from January 7, 1941 to March 16, 1943 certain money as the salary due to the duly elected County Comptroller for the County. A public officer, who at the end of his term of office is again chosen for the office, must generally qualify for the new term by giving bond and taking the oath of office. 42 Am.Jur. 974; and the law presumes that one who is in actual possession of an office has duly qualified. 46 C.J. 960. It sufficiently appears that on January 7, 1941, the defendant's claim of right to occupy the office was based on a new title, a new term and a new qualification, and not on a prolongation of a former term under a title resulting from the election held in November, 1936. The defendant's acts in seeking re-election, accepting a certificate of election in November, 1940, and qualifying anew pursuant to that presumptive evidence of title, constituted an effective abandonment of any claim of right to hold over under the constitution and statute. Handy et al. v. Hopkins et al., 59 Md. 157; Ex parte Gray, Bailey Eq. 77,

8 S.C.Eq. 77, 22 S.C.Reprint 40; 46 C.J. 970; 23 A. & E. Ency. Law, 2d Ed., 417; Throop, Public Officers, § 332.

In one aspect the defendant is in hard case. There is, of course, no question as to his good faith. At the same time he was aware of the plaintiff's contention with respect to the validity of the votes received from electors in the armed services; and he must be held to the knowledge that the final determination of the result of the election might be adverse to him. Hardship to the plaintiff is likewise manifest, if he should be deprived of the emoluments of the term of office to which he was duly elected.

The plea offers no defense to the action; and the demurrer is, accordingly, sustained.

B. ACCOUNTABILITY

(1) Civil and Penal Sanctions

By way of beginning, it may be well to note that, in the case of elective officials in particular, political accountability is the basic check. At the local stratum there are, in addition, numerous legal means of obtaining judicial review of official conduct. The state itself may interpose by resort to penal sanctions or such remedies as injunction, mandamus, quo warranto or special methods of review provided by statute. On occasion the private citizen may seek judicial review in the public interest where the appropriate public authorities have refused to act or demand upon them to do so would be futile. The individual may seek judicial review to protect his private interests, which may or may not be associated with his special relationship to government as a taxpayer, voter, officeholder or candidate for public office. By and large, specific relief is to be preferred in the interest both of the public and of individuals affected. This is most obvious in the case of a taxpayer's suit to restrain the illegal expenditure of public funds. The conventional pattern in equity and with respect to the prerogative writs places specific relief in the category of the "extraordinary" to be employed only where "normal" substitutional redress is not adequate. Why should not the approach be reversed when it comes to the accountability of public officers?

The sanction of civil liability is most important as to large areas of administrative action. Judges of superior courts of general jurisdiction are completely immune from civil liability for acts done in the performance of their judicial business even though tainted with malice. Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646 (1872); Yates v. Lansing, 5 Johns. 282 (N.Y.1810). Judicial independence and other strong policy considerations sup-

port this freedom of judicial decisions from collateral attack. See E. G. Jennings, "Tort Liability of Administrative Officers" 21 Minn.L.Rev. 263, 271 (1937). One would stand in no better case in attempting to recover damages from a legislator, who had not voted to his liking on a given measure affecting his interests. Doubtless the immunity extends to a large extent to the topranking federal and state executive officers. Spalding v. Vilas, 161 U.S. 483, 16 S.Ct. 631 (1896) (cabinet member not liable for his language in an official communication).

When we get down to inferior courts of limited jurisdiction and administrative officers whose authority depends upon statute there is no sweeping rule of immunity. The hazard they face is the risk that, on collateral attack, their good faith determinations on what they thought were the merits will be deemed erroneous decisions as to jurisdictional facts. Thus, if a municipal health officer has authority to require the summary destruction of putrid meat the jurisdictional fact formulation may result in his being held personally liable to the owner of meat for its destruction if the jury finds that the meat was not putrid. The problem is ably treated by Jennings, op. cit. supra, at 276 et seq.

The subject should be considered in relation to the amenability of local government to civil liability in damages. That topic is reserved for more particular treatment in a later chapter. It must be apparent that when a wage earner, the father of nine children, is run down and incapacitated by a municipal garbage truck the real problem of responsibility points to the city, unless, perchance, the truck driver has adequate liability insurance. So long as tenacious notions of governmental immunity, which survive from days when government was not big business, retain their hold, no satisfactory accommodation of the problem of official liability can be effected. Were we to embrace a principle of governmental responsibility for the normal risks which attend the conduct of public business we would provide something approaching adequate protection to the individual and pave the way to fairer treatment of the officer who has acted in good faith and not unreasonably. The new Federal Torts Claims Act, which was adopted as Title IV of the Legislative-Reorganization Act of 1946, is an important step, at the federal level, in this direction. Subject to certain exceptions, it subjects the Government to liability, to be determined in a suit in a federal district court, sitting without a jury, "on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death

in accordance with the law of the place where the act or omission occurred." Section 410(a). It also provides for administrative settlement of small claims. The officers and employees involved are not relieved from liability in the first instance but a voluntary settlement with the Government or a judgment in a case against the Government, would, under the Act, operate to relieve the officer or employee concerned of liability.

BURNS v. ESSLING

Supreme Court of Minnesota, 1923. 163 Minn. 57, 203 N.W. 605.

[Burns, a taxpayer of the City of Eveleth, brought an action against the mayor and councilmen to compel them to restore to the city \$74,661.54 alleged to have been wrongfully appropriated by them out of the funds of the city to subsidize a baseball and a hockey team. The complaint alleged that there were no officers, other than the defendants, to sue in the city's behalf but did not aver that demand had been made upon defendants to do so. On a former appeal an order overruling a demurrer to the complaint was affirmed. The court decided that demand upon defendants to sue was unnecessary because futile under the circumstances.]

LEES, C. A former appeal in this action is reported in 154 Minn. 304, 191 N.W. 899. The case is here now on an appeal from an order denying defendants' motion for a new trial.

The assignments of error question the sufficiency of the findings to support the conclusions of law, the sufficiency of the evidence to support the findings, and certain rulings on the admission of evidence.

The charter of the city of Eveleth provides that the governing body of the city shall be a council composed of the mayor and four councilmen, and grants to the council the power to legislate concerning municipal affairs. The council has control of the city's money, which can be paid out only upon the affirmative vote of three-fifths of the members and by an order signed by the mayor and countersigned by the city clerk. Loans of the city's credit and all contributions or donations not authorized by the charter are prohibited, and the mayor is directed to see to the due enforcement of the provisions of the charter.

The court found that the council made the appropriations and expenditures mentioned in the opinion on the former appeal, that the city received no consideration therefor, and that the money was expended illegally and in fraud of the rights of tax-payers.

Appellants' first point is that, in voting for the appropriations and for the allowance of the bills referred to, the council acted in a legislative capacity and its members incurred no personal liability.

The rule that legislators cannot be called to account for their legislative acts has been applied to village councilmen who in good faith exercise their discretion in voting for a resolution void because of legislative limitations upon their power, Village of Hicksville v. Blakeslee, 103 Ohio St. 508, 134 N.E. 445, 22 A.L.R. 119; and to members of a city council who voted to issue bonds in excess of the limit fixed by the state Constitution, Lough v. Estherville, 122 Iowa 479, 98 N.W. 308. In the latter case doubt was expressed as to whether the rule was applicable where municipal funds were appropriated without form of justification or excuse.

The city council of Eveleth is not a purely legislative body. Claims against the city must be audited and allowed by the council before they can be paid. Bills for lumber, for freight charges, and for board furnished to baseball and hockey players were allowed by the council, and the city's money withdrawn from the treasury to pay them. This was not legislative action, and appellants should not be allowed to escape liability on the plea of legislative immunity.

In expending the city's money, the power of the council was circumscribed, and appellants were bound to look to the charter to ascertain the extent of their authority. Section 74, which forbids the making of contributions or donations, leaves no room for argument. Not only was there a clear lack of authority for the expenditures, but a positive prohibition thereof. The doctrine of the Ohio and Iowa cases cited should not be extended so far as to permit city councilmen to vote public funds away in defiance of the express command of the city charter, without incurring any personal liability for their misconduct. Thus to extend it would expose the city treasury to danger of raids by removing one of the safeguards the law sets about it.

The second point raised is that appellants acted in good faith, and that this is a complete defense. The court found to the contrary, and the first inquiry is whether good faith is a defense, and the second, whether the evidence required a finding in appellants' favor on this point.

The mayor and Councilmen D. A. Murray and William Murray each testified that he believed when he voted for the appropriations and for the payment of the bills in question that the city had a right to expend money for games and sports; that there was no consciousness on his part of any wrongdoing; that he did not intend to violate the law; that there was a public

demand for baseball and hockey; and that the money was spent to satisfy the demand. Is this a good defense?

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In Chippewa Bridge Co. v. Durand, 122 Wis. 85, 89 N.W. 603, 106 Am.St.Rep. 931, it was said of municipal officers who entered into a bridge contract in disregard of the provisions of the city charter, that they had no other motive than to secure a bridge for the city as cheaply as possible and that in that sense they acted in good faith. Nevertheless the court characterized them as lawbreakers, guilty of a wrongful appropriation of the people's money. It was said that officers who knowingly use such money contrary to law, but otherwise to accomplish a legitimate purpose, are guilty in a legal sense of acting in bad faith and of an actionable misappropriation of such money regardless of their good intentions.

Wilcox v. Porth, 154 Wis. 422, 143 N.W. 165, is to the same effect. There the mayor and councilmen audited and allowed an unverified claim against the city. The charter provided that no claim should be allowed unless it was verified. The taxpayers sued the officers to recover the amount which the city had paid to satisfy the claim. The answer pleaded good faith as a defense, but a demurrer to the answer was sustained. See, also, City of Blair v. Lantry, 21 Neb. 247, 31 N.W. 790.

Analogous cases are those which deal with the directors of private corporations. If such directors do acts clearly beyond the scope of their authority, whereby loss ensues to the corporation, or if they dispose of the property of the corporation or pay away its money without authority, they are personally liable to the corporation. 3 Cook, Corp. § 682. Thus in Jones v. Morrison, 31 Minn. 140, 16 N.W. 854, it was held that the authority conferred by statute on the directors of a corporation is subject to the implied condition that it shall be exercised solely in pursuance of the company's chartered purpose and for the benefit of the stockholders; it does not extend to giving the property of the corporation to others; and this is the rule in this state today. Lake Harriet Bank v. Venie, 138 Minn. 339, 165 N.W. 225.

The powers of officials who have charge of the money and property of a city resemble the powers of trustees. City officers derive their authority from the city charter; private trustees derive theirs from the instrument defining the trust. A trustee can exercise his power only for the purposes contemplated by the trust. If he transcends the limits placed upon it and causes damage to the estate, he will be held responsible, although he may have acted in perfect good faith. He is not responsible for mere mistakes or errors of judgment, but is responsible if he deliberately exceeds the authority confided to him, although no

bad faith prompted his acts. 28 Am. & Eng. Enc. of Law, p. 1063; Hun v. Cary, 82 N.Y. 65, 37 Am.Rep. 546; Vernon v. Board of Police, 47 Miss. 181.

When the validity of a claim is in doubt, or the right to make an appropriation is uncertain, or the language of the charter is ambiguous and their action is taken on the advice of counsel, there is reason for exempting city officials from personal liability. In the present case, in less than two years, nearly \$75,000 was taken from the treasury of the city to subsidize a baseball and a hockey team. There is nothing in the charter from which any one could infer that this was permissible. The mayor is a lawyer, but neither he nor the city attorney advised the council that it had authority to use the city's money for any such purpose; legal advice was neither sought nor given. Upon the showing made, the court was clearly justified in holding that there was constructive bad faith.

Evidence that other cities on the Iron Range were doing the same thing was immaterial, and so was evidence that the people of Eveleth knew the facts and did not object, and that a number of them petitioned the council to make the appropriations in question. Liability must be determined by appellants' acts, rather than by their professed intention to obey the law and their apparent belief that they had a right to spend the money as they did.

Citing Bolland v. Gihlstorf, 134 Minn. 41, 158 N.W. 725, it is argued that the rule under which town officers are exempt from liability for their negligent failure to repair roads and bridges should be extended to members of a city council who negligently exceed their authority.

Appellants are not charged with negligence, but with misfeasance in office, to the injury of the city and its taxpayers. Liability for a failure to perform an official duty and liability for an affirmative act of misconduct do not stand on the same footing. See Tholkes v. Decock, 125 Minn. 507, 147 N.W. 648, 52 L.R.A.,N.S., 142, and Stevens v. North States Motor, 161 Minn. 345, 201 N.W. 435.

This is not a case where a city has received property or services in return for its money; it is one where the money was expended for a prohibited purpose, and the city, in its corporate capacity, got nothing in return. Doubtless better exhibitions of baseball and hockey were given than would have been possible if professional players had not been employed, and interest in these sports was aroused and the attention of the young turned away from more questionable forms of entertainment, but the people had to pay for it and for admission to the games

as well. In this respect the situation was not the same as expenditures for public parks or playgrounds, or other like expenditures which are generally held to be permissible.

The Wisconsin doctrine, adopted in a few other states, is that under proper circumstances a taxpayer may maintain an action to compel public officers to repay into the public treasury money paid out illegally to third persons. Webster v. Douglas County, 102 Wis. 181, 77 N.W. 885, 78 N.W. 451, 72 Am.St.Rep. 870; Osburn v. Stone, 170 Cal. 480, 150 P. 367; Russell v. Tate, 52 Ark. 541, 13 S.W. 130, 7 L.R.A. 180, 20 Am.St.Rep. 193. Town of Buyck v. Buyck, 112 Minn. 94, 127 N.W. 452, 140 Am.St.Rep. 464, pointed to the probable holding of this court and the adoption of the Wisconsin rule when the question now presented was brought before the court, and Bailey v. Strachan, 77 Minn. 526, 80 N.W. 694; Stone v. Bevans, 88 Minn. 127, 92 N.W. 520, 97 Am.St.Rep. 506, and Town of Martinsburg v. Butler, 112 Minn. 1, 127 N.W. 420, pointed in the same direction.

We approve of the Wisconsin doctrine, and its application to the facts in the case at bar leads to the conclusion that appellants are liable.

The record shows that D. A. Murray and William Murray were not present at some of the meetings of the council at which certain appropriations were made. It appears, however, that the Murrays were both members of the Athletic Association and that D. A. Murray was director of baseball for the association. The association was not incorporated. The money appropriated at meetings not attended by the Murrays was either received by the association or paid out on its account. Under these circumstances, they cannot escape liability because they did not actually vote for all the appropriations.

The appellants, by cross-examination of the respondent, attempted to show that his motives in prosecuting the action were not disinterested. The court excluded this evidence. The rulings were correct. It is wholly immaterial whether respondent is prosecuting the action to satisfy a grudge, or whether he is courageously performing a civic duty. 5 McQuil.Mun.Corp. § 2584; Chippewa Bridge Co. v. Durand, supra.

Complaint is made because at one stage of the trial the court ruled that evidence of the good faith of the appellants was not material and, at a later stage, that appellants might introduce such evidence, and respondent evidence in rebuttal.

Appellants insist that if they had not been misled by the first ruling, they would have offered more evidence of their good faith, and that the finding that they did not act in good faith might not then have been made. We think the result could not have been different if all the evidence appellants offered had been received and considered by the trial court; but this aside, the record shows that in the course of the trial respondent's counsel stated in open court that when they said the question of good faith was not in the case, they meant that appellants had not received and kept any of the money appropriated and were not dishonest in that respect. Appellants, therefore, had notice that it would be contended that in a legal sense they were chargeable with bad faith. They had an opportunity before the trial ended to offer any evidence they could produce to meet that issue. In fact, they made numerous offers of proof relative thereto, but the offers were rejected. For reasons already stated, this was not error.

Order affirmed.

WASSERMAN V. CITY OF KENOSHA

Supreme Court of Wisconsin, 1935. 217 Wis. 223, 258 N.W. 857.

Action commenced on the 25th day of February, 1931, by plaintiffs to recover damages from the defendants, municipal officials and the municipal corporation, for the alleged cancellation of a building permit. The complaint alleges that the plaintiffs were jointly interested in certain property and in the erection of a building in the city of Kenosha; that application for a building permit was duly presented, and on the 19th of April, 1929, there was issued to the plaintiffs a building permit authorizing the plaintiffs to proceed with the erection of the building according to the plans and specifications which had been approved by the officials of the city; that work had been begun and considerable money expended in and about the erection of the building; that on the 2d day of May, 1929, the permit was wrongfully canceled; "that in revoking said permit and the prevention of the construction of said building the said city of Kenosha was actuated by its private and corporate business interests other than governmental, legislative, judicial and discretionary powers and duties, and said city of Kenosha and its officers were each actuated by and mindful of their own personal, financial, political office-holding and election interests in the said matter and acted in the revocation of said permit by reason of such motives; that each of the said defendant city officials were actuated not only by private business and corporate interests of the said city of Kenosha but by their own individual welfare, political and otherwise, and acted in the said matter of the revocation of said permit by reason thereof. . . That said city of Kenosha and its said officers, the defendants

herein, became apprehensive that the revenues and emoluments of said city of Kenosha might be or become adversely affected by reason of the erection and construction of said slaughter-house and became apprehensive that the said slaughter-house might change the nature of said vicinity and depress the value of property in said vicinity and cause great loss to the city of Kenosha in its business interests and its local property and ministerial interests and duties."

FAIRCHILD, JUSTICE. . . . The appellants seek to recover damages claimed to have resulted from acts of a municipality of which the individuals named as defendants were officers. The allegations on which reliance is placed to take the complaint out of the rule that no liability for damages is visited upon a municipality or its officials acting within the powers which may be generally described as governmental unless some statute provides therefor are set out in the statement of facts. In dealing with official acts, consideration must be given to the general policy of the law to protect public officials from the annovance of being constantly subjected to action's by individuals disappointed by the vote or ruling of the officials. The issuing or revoking of a building permit is a governmental function, and it remains such a function regardless of the motives or manner in which it is executed or revoked. State ex rel. Rose v. Superior Court of Milwaukee County, 105 Wis. 651, 81 N.W. 1046, 48 L.R.A. 819; Madden v. Kinney, 116 Wis. 561, 93 N.W. 535. The policy of protecting officials in the discharge of legislative and quasi judicial duties and while acting within the limits fixed by law is founded on good reasoning and should be adhered to. The rules which are the expression of this policy apply to officials in the performance of duties requiring the exercise of discretion and judgment, and ordinarily the motives which actuate such officials in so acting cannot be inquired into in an action by an individual under a complaint for damages. Such officials within their jurisdiction, are not liable for damages either for mistake, errors of judgment, or corrupt conduct. As was said in Land, Log & Lumber Co. v. McIntyre, 100 Wis. 258, 262, 75 N.W. 964, 970, 69 Am.St.Rep. 925: "As said, in effect, by this court, in Steele v. Dunham, 26 Wis. 393, such rule applies to all officers in the performance of judicial or quasi judicial duties, to judges from the highest to the lowest, to jurors, and to all public officers whatever name they may bear; and further, in substance, that if it were otherwise, officers, however conscientious and correct in their official life would be constantly in danger of having their actions challenged in court by disappointed persons, and that independence necessary to the judicial function seriously interfered with. To avoid that danger, judicial officers, high or low,

such officers, strictly so called and those quasi judicial as well, and all in the performance of duties of a judicial nature, within their jurisdiction, have complete immunity from actions for damages on account of their official acts."

. . . The case of Fath v. Kceppel, 72 Wis. 289, 39 N.W. 539, 7 Am.St.Rep. 867, dealt with the powers and duties of an officer to inspect fish offered for sale in a city and to destroy such as were unwholesome. His duties were disclosed to be judicial in their nature, and in the opinion it was said (page 293 of 72 Wis., 39 N.W. 539, 540):

"The powers conferred on the defendant by law, according to the complaint, are plainly and clearly judicial, and of great importance. He is vested with power to determine the quality and healthfulness of fish in market, and, if unwholesome or unfit to be eaten, to condemn and destroy them. This is a high and responsible judicial power, as it concerns the public health, and as it may affect the rights of property; and the officer exercising such a power is within the protection of that principle, that a judicial officer is not responsible for damages to any one for any judgment he may render, however erroneously, negligently, ignorantly, corruptly, or maliciously he may act in rendering it, if he act within his jurisdiction. This principle is stated and given force in Steele v. Dunham, 26 Wis. 393, by the present chief justice, to shield from liability members of an equalizing board or board of review of assessments, who are charged with liability for damages to the plaintiff, for corruptly and oppressively increasing the valuation of certain property without proof. Much more should this principle protect from actions for private damages an inspector of fruits and meats, acting in the interest of the public health. This principle protects all officers exercising judicial powers, whatever they may be called. It is 'a judicial privilege,' and is 'a deep root in the common law,' and found 'asserted in the earliest judicial records, and it has been steadily maintained by an undisturbed current of decisions.' Yates v. Lansing, 5 Johns. [N.Y.] 291. . . . But this principle is so elementary, and so well established in all like cases, that reference to any further authorities is unnecessary. The complaint most clearly ranks the defendant as a judicial officer, and places him under the protection of this principle, and it therefore fails to state a cause of action against him."

This case was considered in Lowe v. Conroy, supra, and was overruled so far as it conflicted with the right to recover damages for the invasion of private property rights. Conroy was a health officer, and in that case was held to have summarily destroyed private property on the ground that it constituted a menace to public health, when in fact it was not such a menace.

The Conroy Case was cited in State ex rel. Bautz v. Harper, 166 Wis. 303, 165 N.W. 281, 285, in which Harper, a building inspector, had erroneously refused a building permit. It was there said: "This duty imposed on him by ordinance was clearly of a quasi judicial nature. It is the general rule that officials acting in an honest exercise of their judgment in the discharge of such duties are not liable in damages to private persons for their mistakes and errors.

"The denial to relator of a building permit is not an invasion of his private property rights, and hence does not bring him within the exception specified in the Lowe Case, making quasi judicial officers responsible in those cases of an invasion of private rights for which the law provides no redress other than in a private action for compensation for the loss sustained." . . .

The argument of appellants that, because the permit was issued, they are entitled to be protected against loss for the reason that they expended money in and about the erection of the building, was answered adversely to them in the Lindemann Case. One so situated actually desiring to complete the building may, as pointed out in that case, find relief by means of an injunction against any interference with the right to proceed under the permit. State ex rel. Carter v. Harper, 182 Wis. 148, 196 N.W. 451, 33 A.L.R. 269.

The allegations in this complaint which are not contained in the complaint in the Lindemann Case are addressed to the motives which influenced the officials of the city in forming their conclusion to revoke the building permit. The motive of an official exercising discretionary powers in voting for a particular resolution or taking some certain action cannot be inquired into, and he cannot be made personally liable upon an allegation that he acted maliciously toward the one aggrieved. This is the same rule which applies to judicial officers, and it rests upon the same considerations. The allegations add nothing in the way of strength to the complaint. The attempt of the pleader to establish the fact that the city was acting in a proprietary capacity and not in its governmental capacity fails because the recital of the transaction necessarily shows that the conduct of the affair, regardless of whether the right conclusion was reached, was in the exercise of the city's governmental and discretionary powers and functions. The allegation that selfish considerations and concern for personal advantage was the controlling motive prompting the officials to act as they did is subject to similar criticism.

Order affirmed; cause remanded for further proceedings according to law.

BIRD v. McGOLDRICK, CITY COMPTROLLER

Court of Appeals of New York, 1938. 277 N.Y. 492, 14 N.E.2d 805, 116 A.L.R. 1059.

LEHMAN, JUDGE. The petitioner, Patrick Bird, is the clerk of the Municipal Court of the City of New York, Borough of Manhattan, Third District. The salary attached to that position is \$3,500 per annum. He has not been paid his salary for the four months from January to April, 1936. The reason given by the Department of Finance of the city is that the Commissioner of Accounts reported to the Comptroller that an audit of the accounts of the petitioner showed "that fees amounting to the sum of \$11,562.66 which were or should have been collected in petitioner's office during the period from April 27, 1926, to December 31, 1933, had not been accounted for and paid into the City Treasury by the clerk of the court."

The petitioner obtained an alternative order of mandamus which required the Comptroller to pay to the petitioner his salary or to show cause why such payment should not be made. Upon the trial of the alternative order, it appeared that the petitioner had not been guilty of any personal delinquency, and had not failed to account for all fees or money which he had received personally. No charges of wrongdoing were ever filed against him, and it does not appear that there has been even suspicion or whisper of wrongdoing on his part. Much of the work of the office of clerk of the Municipal Court was performed by assistants and subordinates of the clerk. The clerk had some power of direction and supervision of the work of the office, but he did not have power to choose or to remove the assistants and subordinates who performed much of that work. They were required to collect and pay over fees fixed by law. During the years from 1926 to 1935, fees amounting to nearly one million dollars were actually collected and paid over; but an audit made by accountants indicated that about \$11,000, in addition, should have been collected and paid over.

The petitioner does not seriously challenge the existence of a shortage in the fees that should have been collected. A court interpreter, Othmar Schmidt, was occupied only a few hours a week by his court duties. At times when not so occupied he was directed to work in the "cage" where fees are paid, though he was not bonded like other assistants whose duty it was to handle public moneys. Schmidt has been convicted of forgery in the third degree, and though at this trial there was no attempt made to show that he has embezzled fees received by him and then by forgery concealed his embezzlement, yet it may fairly

be inferred that he is responsible for some or all of the alleged shortage. That shortage, it is plain, consisted, in large part, of moneys actually collected for jury fees and other court fees, as shown by indorsements on court papers and documents, but which are not recorded in the cash book. In part, however, it may have been due to failure to collect fees fixed and exacted by law.

The Municipal Court Code, § 143, Laws 1915, c. 279, as amended by Laws 1928, c. 614, provides that the clerk of the Municipal Court in each district shall, among other things,

- "6. Assume charge and control of, and be responsible for, the general conduct of the business of his office and for the faithful discharge of the duties of the deputy and assistant clerks and other officers connected with the court.
- "7. Collect and receive all the fees, and account for and pay the same into the city treasury monthly, under oath, on the first day of each and every month or within three days thereafter, which account shall contain the title of each case and the amount of fees received therein; and the salary of such clerk shall not be paid until he shall have so accounted and paid. He shall perform no service until he shall have received the legal fees therefor."

At the trial held under the alternative order of mandamus, the trial judge charged the jury that the question for them to decide was whether the alleged shortage was the result of any personal dereliction of the petitioner, either of commission or of omission; and that the petitioner could not be charged with responsibility for dereliction of an assistant or subordinate not chosen by him. The jury found in favor of the petitioner and upon its verdict a final peremptory order of mandamus which directed the Comptroller to pay to the petitioner the salary due to him, was granted at Special Term. The question to be decided upon this appeal is whether the law imposes upon the petitioner responsibility for any failure to collect, account for, and pay over lawful fees regardless of whether or not such failure is due to dereliction on his part.

The measure of the liability of a public official, having custody of public moneys, for the loss of such moneys, has long troubled the courts. In Lane v. Cotton and Frankland, 1701, 1 Ld. Raymond 646, the court held, Sir John Holt, C. J., dissenting, that no personal liability exists except for personal misfeasance or neglect, and that a public officer may not be held responsible for misconduct of his subordinates. Cf. Whitfield v. Le Despencer, 2 Cowp. 754. In Supervisors of Albany County v. Dorr, 1841, 25 Wend. 440, at page 442, a similar question was presented, and the Supreme Court of the state, citing the English

cases and some American authorities, judicial and extrajudicial, unanimously decided that liability of public officers for the loss of moneys in their custody is "brought down to the ordinary case of misfeasance or neglect by the defendants themselves in the duties of their office." An appeal was taken to the Court of Errors, and that court divided equally upon the question and a technical affirmance of the judgment of the Supreme Court resulted. Id., 7 Hill 583.

The affirmance by an equally divided court was not regarded as an authoritative decision definitely settling the law. The question was still regarded as open until the decision of this court in Tillinghast v. Merrill, 151 N.Y. 135, 142, 45 N.E. 375, 376, 34 L.R.A. 678, 56 Am.St.Rep. 612, and in that case this court definitely overruled the decision in Supervisors of Albany County v. Dorr, supra, and held that the weight both of argument and of authority in America is in favor of the "rule of strict liability which requires a public official to assume all risks of loss and imposes upon him the duty to account as a debtor for the funds in his custody." The court there left open only the question of whether this "strict liability" would include a case where the funds are lost by the "act of God or the public enemy," citing United States v. Thomas, 15 Wall. 337, 21 L.Ed. 89.

From the time when the courts were first called upon to determine the measure of liability of a public official for moneys in his custody, judges have recognized that choice of any rule must depend upon the weight to be given to conflicting considerations of public policy. The dissent of Sir John Holt from the early decision in Lane v. Cotton and Frankland, supra, that a postmaster is not responsible for money stolen or lost without his fault, was based upon the ground that a sound public policy dictated the rule of strict liability in order to prevent frauds. The choice made by this court of the rule of strict liability in Tillinghast v. Merrill, supra, was in large degree based upon similar views of public policy.

"We must consider and decide this question upon general principles and in the light of public policy. . . . It shocks the sense of justice that the public official should be held to any greater liability than the old rule of the common law which exacted proof of misconduct or neglect.

"It is at this point, however, that the question of public policy presents, and it may well be asked whether it is not wiser to subject the custodian of the public moneys to the strictest liability, rather than open the door for the perpetration of fraud in numberless ways impossible of detection, thereby placing in jeopardy the enormous amount of the public funds constantly

passing through the hands of disbursing agents." 151 N.Y. 135, at page 142, 45 N.E. 375, 376, 34 L.R.A. 678, 56 Am.St.Rep. 612.

There can be no doubt that the rule of strict liability for moneys received by a public official is in accord with the great weight of authority in this country. Indeed, the decisions, both federal and state, are almost uniform. Many are cited in the opinion in Tillinghast v. Merrill, supra, and it would serve no useful purpose to add later citations which also support the rule. Even so, a careful analysis of recent decisions seems to indicate a growing sense of the injustice of imposing liability upon a public official without exacting proof of misconduct or negligence on his part, especially where loss is due solely to the dereliction of a subordinate who is not chosen by the official held liable. Though this court has reiterated the rule of a public officer's strict and almost absolute liability for public moneys received by virtue of his office (Yawger v. American Surety Co., 212 N.Y. 292, 106 N.E. 64, L.R.A.1915D, 481; Trustees of Village of Bath v. McBride, 219 N.Y. 92, 113 N.E. 789: City of New York v. Fox, 232 N.Y. 167, 133 N.E. 434), yet it may be noted that only in the last cited case did it appear that the loss was due to the dereliction of a subordinate and there the court pointed out that the subordinate was chosen by the official held liable.

Changing judicial views of public policy are an insecure basis for the extension or limitation of established rules of liability or for the rejection of a common-law rule of liability and the formulation of a new rule. The judicial rule of liability, without fault, for the loss of public funds received by an officer, even if unduly harsh, is too well established to be changed by the courts. It is for the Legislature, not the courts, to change or limit the rule if such change seems wise. Even so, this court might hesitate to extend a rule (formulated by this court on grounds of public policy) which imposes upon public officers strict liability for loss of public moneys received, so that such liability would include also loss caused to the public by failure of a subordinate to collect public moneys.

No such question is, however, presented in this case. The petitioner's responsibility rests not upon a judicial rule of liability, but upon a rule of liability created by the Legislature. The statute in clear terms makes the petitioner "responsible for, the general conduct of the business of his office and for the faithful discharge of the duties of the deputy and assistant clerks and other officers connected with the court." The statute, again, places upon the petitioner the duty to "collect and receive all the fees, and . . . pay the same into the city treasury

monthly." The petitioner through the dereliction of "officers connected with the court" has failed to collect and to pay over all the fees he was required to collect. A shortage exists, and under the statute the Comptroller was required to withhold the salary of the petitioner until he shall have accounted for and paid all the fees that were collected or that should have been collected. The courts may not exempt the petitioner from responsibility imposed by the Legislature. The statutory measure of responsibility is attached to the petitioner's office and accepted by him when he accepts the office.

That the liability of the petitioner is created and must be measured by the statute, and not by the rule formulated by the court in Tillinghast v. Merrill, supra, appears clearly from the opinion in that case, and the explanation by the court of the earlier decisions of Muzzy v. Shattuck, 1 Denio, 233, and People ex rel. Nash v. Faulkner, 107 N.Y. 477, 14 N.E. 415. Where, as in this case, there is a statute defining the duties and liabilities of a public officer, no consideration of public policy can properly induce a court to reject the statutory definition.

The orders should be reversed and the application of the petitioner denied, with costs in all courts. . . .

RIPPEY, J., dissents.

Probably the most common type of situation to which "the judicial rule of liability without fault, for the loss of public funds received by an officer" has been applied is that where the officer deposited the funds in a bank which later failed. Notes 93 A.L.R. 819 (1934) and 155 A.L.R. 436 (1945). Since the officer and his bondsmen, under this theory, are, in effect, insurers, all the governmental unit need do to hold them is to show that the funds have not been produced when required. This has led to an interesting result in several jurisdictions; the officer has been permitted to set off the claim on the official deposit, clearly designated as such, against his personal liability to the bank, and this without proof that the governmental unit's claim is actually protected by the financial responsibility of the officer and his sureties. People ex rel. Nelson v. Joliet Trust and Savings Bank, 275 Ill.App. 138 (1934); Coburn v. Carstarphen, 194 N.C. 368, 139 S.E. 596, 55 A.L.R. 819 (1927). This is to let equity's policy favoring set-off run roughshod over the policy of strict fiduciary accountability. The Supreme Court of Pennsylvania has very forcefully asserted the fiduciary character of such a deposit and its integrity as such in denying set-off. Witherow v. Weaver, 337 Pa. 488, 12 A.2d 92 (1940). It should not be overlooked,

moreover, that to permit set-off may be to jettison a lawful preference enjoyed by the unit as a depositor. It is true, however, that even in the jurisdictions, which allow the state a prerogative preference, it is usually denied local units. Notes 36 A.L.R. 640 (1925), 52 A.L.R. 755 (1928) and 90 A.L.R. 208 (1934).

The drastic rule of absolute liability has not received universal judicial approbation. There is authority that the officer's accountability should be that of a bailee. Jordon, County Attorney, v. Baker, County Judge, 252 Ky. 40, 66 S.W.2d 84, 93 A.L.R. 813 (1933). Where, moreover, he has no choice, but must deposit the funds in banks designated by law, or by other public authority pursuant to law, the rule of absolute liability may be deemed inapplicable even though the statute does not expressly modify it. City of Scranton, Pa., v. Aetna Casualty and Surety Co., 11 F.Supp. 986 (D.C., M.D.Pa., 1935), affirmed 94 F.2d 941 (C.C.A.3rd, 1938). In a number of jurisdictions the rigor of the insurer rule has been mitigated by statute.

It has been stated as an exception to the doctrine of respondeat superior that a public officer is not liable for the wrongful acts of subordinates, who are also public officers or employees as distinguished from persons engaged in his private service. See Robertson v. Sichel, 127 U.S. 507, 8 S.Ct. 1286 (1888). This plainly must be qualified in keeping with the facts as to the superior's power of appointment, supervision, suspension and removal. In a recent California case it was held that a complaint of a personal representative for wrongful death of the deceased. which alleged that deceased died as a result of a beating given him by city police while he was a prisoner in the city jail, that the defendant city manager and chief of police had or ought to have had prior notice that the policemen were vicious and unfit (reciting numerous instances of brutality) and that the city manager and chief of police had authority to suspend and remove policemen subject to review by a civil service board, but had taken no steps in that direction, stated a cause of action. Fernelius v. Pierce, 22 Cal.2d 226, 138 P.2d 12 (1943). The Court rejected the contention that defendants should not be held liable unless they had unrestricted power of removal. That factor was not controlling if exercise of a restricted power of suspension and removal would, as a normal matter, have sufficed to prevent the injury. See also Hale v. Johnston, 140 Tenn. 182, 203 S.W. 949 (1918).

Penal sanctions, applicable particularly to public officers, are, in these times, largely a matter of statute. Unless superseded by statute the old common-law misdemeanor, misconduct or

misbehaviour in office, will cover some of the ground.⁵ The general offense has been broken down, formalistically, into nonfeasance, misfeasance and malfeasance. More to the point is the fact that the common instances of the offense, extortion, oppression, wilful neglect of duty and fraud and breach of trust, came to be looked upon as specific offenses within the general one. A common type of statute, supported by a criminal sanction, is that prohibiting a public officer from acting officially with respect to a public contract as to which he has a private interest. Many other examples are given in 2 McQuillin, Mun. Corps. § 573 (Rev. vol. 1939).

A Missouri city charter provision forbade political activity by city employees in the classified services. The penalty for violation was discharge. The provision was upheld in State ex inf. McKittrick, ex rel. Ham v. Kirby, 349 Mo. 988, 163 S.W.2d 990 (1942); 43 Col.L.Rev. 242 (1943). The court relied, significantly, upon the circumstance that, in general, the "line between the classified and the unclassified civil service coincides with the classification of ministerial and policy-forming public officers."

The Hatch Act, as amended in 1940, provides, in part (18 U.S.C.A. § 611.):

(a) No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall (1) use his official authority or influence for the purpose of interfering with an election or a nomination for office, or affecting the result thereof, or (2) directly or indirectly coerce, attempt to coerce, command, or advise any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person

⁵ Clark and Marshall, Crimes § 434 (a) (3rd ed. 1927):

A public officer is guilty of a misdemeanor at common law if, from an improper motive, and in the exercise of the duties of his office, or under color of exercising such duties, he does an illegal act, or abuses his discretionary power, or if he commits any fraud or breach of trust affecting the public, or if he willfully neglects to perform his duty without sufficient excuse.

And a person is guilty of a misdemeanor if he unlawfully refuses or omits to take upon himself and serve any public office which he is by law required to accept if duly appointed unless some other penalty is provided, or there is some custom to the contrary.

Some statutes may be considered merely codification of the common law. On the other hand, the willfulness involved in the common law crime may not be an element of a statutory offense relating to misconduct in office. Commonwealth v. Brown, 116 Pa.Super. 1, 175 A. 748 (1934).

for political purposes. No such officer or employee shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of the second sentence of this subsection, the term "officer or employee" shall not be construed to include (1) the Governor or the Lieutenant Governor of any State or any person who is authorized by law to act as Governor, or the mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil-service system; (3) officers holding elective offices.

Enforcement is the responsibility of the United States Civil Service Commission. If one who violates the act is not removed from his office or position the Commission may require the appropriate federal agency to withhold from the governmental unit concerned an amount equal to two years' compensation of the officer or employee involved.

(2) Removal—Recall

Amotion, that is, the removal of an officer in a corporation from office, was determined, in Rex v. Richardson, 1 Burr. 517, 97 Eng.Reprint 426 (1758), to be within the implied powers of a corporation. In the English practice the power was deemed that of the corporation at large unless delegated to a select body. II Dillon, Mun.Corps. § 463 (5th ed. 1911). There is some American authority supporting the incidental power of municipal governing bodies to remove municipal officers for cause, whether elected by them or by the people. Probably the leading case is Richards v. Clarksburg, 30 W.Va. 491, 4 S.E. 774 (1887). See the strong dictum in Hayden v. Memphis, 100 Tenn. 582, 47 S.W. 182 (1898). Judge Dillon, quite cautiously, and Mr. McQuillin, more positively, support the power. I Dillon, op. cit. supra, § 462; 2 McQuillin, Mun.Corps. § 575 (Rev.vol.1939). The subject of removal from office has, of course, been largely regulated by positive law. Thus, the implied power of amotion is hardly a matter of large importance in contemporary local government law.

Impeachment is a process not commonly available against local officials.

The three most conspicuous methods of removal of local officers are ouster by civil suit, removal by action of executive, administrative or local legislative authority and recall by vote of the electors. Unless the power is qualified in some way by the constitution itself, a state legislature has plenary authority over the subject. It may abolish an office at mid-term. It may provide for removal without any formality whatever. Thus, even where an elective officer's term is fixed by law, as is usually the case, the statute may also make him removable at the pleasure of an appropriate authority. 2 McQuillin, op. cit. supra, § 577. That is less security of tenure than an appointive officer may enjoy where his term is fixed by a statute, which is silent as to removal, and where there is an applicable general law providing machinery for removal for cause by civil suit. Brock v. Foree, 168 Tenn. 129, 76 S.W.2d 314 (1934).

Statutes authorizing removal for cause, if well drafted, expressly make provision for notice and an opportunity to be heard. Obvious considerations of fair play strongly impel the courts to find the hearing requirement to exist by implication, even where the statutes are silent. See cases collected in Note 99 A.L.R. 336, 354 et seq. (1935). Consider the situation where the statute clearly precludes such an implication.

STATE ex rel. RYAN, Police Judge, v. NORBY, Mayor

Supreme Court of Montana, 1946. 118 Mont. 283, 165 P.2d 302.

ANGSTMAN, JUSTICE. David J. Ryan was elected to the office of Police Judge of the city of Great Falls on April 2, 1945, to serve for a two-year term. He qualified and assumed the duties of his office on May 7th and continued in the office until November 14th.

On November 13, 1945, the city notified Mr. Ryan in writing that a final report of the State Examiner was filed with the city council on that date, which report "displays a shortage in your accounts as Police Judge in the sum of Three Hundred Twenty-Six and no/100 (\$326.00) dollars," and that acting under Chapter 179, Laws of 1939, the council "did declare the office of Police Judge of said City, vacant, and your right to said office forfeited, and did elect Volney J. Babcock, Sr. to fill said vacancy."

Relator thereupon brought this proceeding seeking a writ requiring respondents to annul, vacate and set aside the proceedings taken against him by the city council on November 13th.

He questions the validity of Chapter 179, Laws of 1939, on several grounds. That chapter in definite terms provides that upon filing a final, verified report by the State Examiner showing a shortage in accounts in an office, the right of the officer

to the office "shall be forfeited, and such office shall thereupon become vacant."

The respondents did what the statute commands and hence the only question before us is, Is the statute valid?

Our Constitution empowers the legislative assembly to provide for police courts and magistrates. Section 24, Article VIII. This the legislature did. Sections 5087, 4995 and 4996, Revised Codes. Hence the office of police Judge, though recognized by the Constitution, is not a constitutional but a statutory office. A police judge is not a "judicial officer" as that term is used in section 17, Article V of our Constitution. State ex rel. Working v. Mayor, 43 Mont. 61, 114 P. 777. A police judge is subject to removal from office under section 18 of Article V of the Constitution, reading: "All officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law."

The removal here, if not for misconduct or malfeasance in office within the meaning of section 18, Article V of our Constitution, was at least for an alleged cause, which, if proven, might subject the incumbent of the office to criminal prosecution.

Relator contends that, since the attempted removal was for an alleged cause, he must be given notice and an opportunity to defend before he can be declared to forfeit the office and that the statute which denies him that right is invalid. There are many cases throughout the country which have dealt with this question under facts varying in each particular case.

When considering the question of the necessity of notice and opportunity for hearing, the majority of the courts throughout the country which have considered the point hold that if the removal is for cause, notice and an opportunity to defend are essential. Some courts extend the holding to all offices for a fixed term, whether elective or appointive, while others confine the holding to an elective office for a fixed term. Nearly all courts, when dealing with an elective office, for a fixed term, as here, require notice and opportunity to defend before removal for cause will be upheld.

The United States Supreme Court has dealt with the subject. In Reagan v. United States, 182 U.S. 419, 21 S.Ct. 842, 845, 45 L.Ed. 1162, Chief Justice Fuller, speaking for the court, said: "The inquiry is, therefore, whether there were any causes of removal prescribed by law March 1, 1895, or at the time of the removal. If there were, then the rule would apply that where causes of removal are specified by Constitution or statute, as also where the term of office is for a fixed period, notice and hearing are essential."

In the later case of Shurtleff v. United States, 189 U.S. 311, 23 S.Ct. 535, 536, 47 L.Ed. 828, the court was dealing with the office of general appraiser of merchandise created not by the Constitution but by act of Congress. The court, in discussing the point we are considering said: "There is, of course, no doubt of the power of Congress to create such an office as is provided for in the above section. Under the provision that the officer might be removed from office at any time for inefficiency, neglect of duty, or malfeasance in office, we are of opinion that if the removal is sought to be made for those causes, or either of them, the officer is entitled to notice and a hearing."

The court further pointed out that: "Various state courts have also held that, where an officer may be removed for certain causes, he is entitled to notice and a hearing." It then cited numerous state court decisions so holding.

Since then, this court has so held in State ex rel. Nagle v. Sullivan, 98 Mont. 425, 40 P.2d 995, 99 A.L.R. 321, and State ex rel. Holt v. District Court, 103 Mont. 438, 63 P.2d 1026. Both of these cases dealt with an appointive office and one of legislative creation but for a fixed term. A long list of cases supporting this view are listed in 99 A.L.R. pp. 354 to 363.

This court in State ex rel. Nagle v. Sullivan, supra [98 Mont. 425, 40 P.2d 998], said: "It follows, inevitably, that when a statute provides for an appointment for a definite term of office, without provision otherwise, or provides for removal 'for cause', without qualification, removal may be effected only after notice has been given to the officer of the charges made against him and he has been given an opportunity to be heard in his defense."

The statute involved in the Nagle case said nothing about notice and hearing but, nevertheless, the court said: "We do hold that whenever the charges on which the Executive proposes to act involve malfeasance, misfeasance, or nonfeasance in office, or directly reflect upon the official or personal integrity of the incumbent whom he proposes to remove, the statute requires notice and the opportunity to disprove, if possible, the charges made."

The courts do not point out the precise reason for the conclusion that notice and hearing are essential. Our Constitution, Section 27 of Article III, provides that "no person shall be deprived of life, liberty, or property without due process of law." Notice and the opportunity for a hearing are a part of due process of law. Application of O'Sullivan, 117 Mont. 295, 158 P.2d 306. But is the right to a public office either liberty or property within the meaning of Section 27, Article III? The courts have

quite generally held that a public office is a public trust and not property within the meaning of the due process clause of the Federal Constitution, Amend. 14. The rule has always been opposed by strong dissenting opinion. See Taylor v. Beckham, 178 U.S. 548, 20 S.Ct. 1009, 44 L.Ed. 1187.

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This court has followed the majority view in State ex rel. Nagle v. Sullivan, supra, and State ex rel. Grant v. Eaton, 114 Mont. 199, 133 P.2d 588, and in other cases therein cited. Of course the right to a public office is not property or an estate that may be passed by will, inheritance or other transfer. It is a public trust. However, the incumbent of an office for a definite term carrying a fixed salary certainly has a property interest therein within the meaning of Section 27, Article III of our Constitution.

While, as above stated, most courts have held a public office is not property, there is a growing tendency on the part of courts to recognize a property interest therein at least for certain purposes. Some courts refer to a public office as a species of property. 42 Am.Jur., Public Officers, sec. 9, note 15. Others hold that it is property for certain purposes and in certain types of cases.

Thus in 42 Am.Jur., section 9, page 887, it is said: "But it does not follow that he has absolutely no financial or property interest which may be protected by a court of equity against wrongful interference by others, or that he may be deprived of his office without a hearing when the right to have it terminate is limited to specified causes. The incumbent's right to the office is everywhere recognized as a privilege entitled to the protection of the law, and an office may be considered as property in controversies relating to the question as to which of two persons is entitled thereto."

Whatever the view may be elsewhere, the question is foreclosed in this state by statute. Section 6663 provides: "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this code, the thing of which there may be ownership is called property."

And section 6664 provides: "There may be ownership of all inanimate things which are capable of appropriation or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill as the composition of an author, the good will of a business, trade-marks and signs, and of rights created or granted by statute."

The right of an elected public officer to possess and use an office and to exercise the privileges and rights therein to the

exclusion of others until properly removed, certainly constitutes a property interest within the meaning of these sections.

A public officer has rights created and granted by statute and under section 6664 those rights constitute property.

Whether the federal Constitution guaranteeing due process has application here in view of the case of Snowden v. Hughes, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497, we need not consider.

Chapter 179 so far as it declares an elective office for a fixed term vacant upon the mere filing of the report therein provided for without notice or hearing conflicts with Section 27 of Article III of the Constitution of Montana and is invalid.

Respondents contend that since Chapter 179 authorizes an action in quo warranto to test the accuracy of the report of the Examiner, relator is accorded opportunity for a hearing sufficient to meet the requirement. But this question, too, was ruled on adversely to this contention in State ex rel. Nagle v. Sullivan where the court said: "His attempt to justify the action is unavailing as an ex post facto showing of cause cannot cure failure to give the necessary notice of hearing on such charges (Board [of St. Com'rs of Hagerstown] v. Williams, 96 Md. 232, 53 Atl. 923); 'every condition precedent must be fulfilled to give validity to the act of removal' (23 Am. & Eng.Ency. of Law, 450.)"

The writ applied for will issue.

JOHNSON, C. J., and ADAIR, J., concur.

CHEADLE, JUSTICE (concurring in result). I concur in the result reached by the majority. I think that the cause for forfeiture prescribed by Chapter 179, Laws of 1939, is not necessarily "misconduct or malfeasance in office," and, therefore, that every protection of law and custom of the rights and reputation of a public officer should be afforded. While there is authority apparently to the contrary, I feel that the power to deprive an officer of his office for cause, means for proven cause, and that proven cause presupposes cause established by hearing at which the officer is given opportunity to present facts to disprove the charges. Although here the relator is not accused of a criminal act, I feel that common fairness, in accordance with our traditional American system of justice, requires opportunity for a public officer to protect his good name and reputation. Chapter 179, if held valid, would deprive relator, and other public officers, of such opportunity.

This is not to say that the right to public office transcends the right of the public to an honest administration of that office, or that the right is such a property right as may not be forfeited for cause as the Constitution provides or the legislature has

determined or may determine. If such cause exists here, laws in existence at the time of the passage of Chapter 179 are adequate to effect the result attempted, and to protect the public interest, as well as those of the relator.

Morris, Justice (concurring specially). I concur in the foregoing opinion of Mr. Justice Angstman wherein he holds that an elective public officer cannot be ousted without notice and an opportunity to be heard. I do not concur, however, in the holding that the right to an office is a property right. It is my view that the right vested in the office holder to defend his occupancy is that he may uphold the will of the electorate and exercise the public trust reposed in him until removed for cause.

POTTS v. MOREHOUSE PARISH SCHOOL BOARD

Supreme Court of Louisiana, 1933. 177 La. 1103, 150 So. 290, 91 A.L.R. 1093.

ROGERS, JUSTICE. J. E. Potts was employed as assistant superintendent of schools by the Morehouse parish school board for a term of seventeen and one-half months, beginning January 15, 1932, and ending June 30, 1933, at an annual salary of \$3,000, payable at the rate of \$250 per month. Plaintiff was discharged on July 14, 1932, before his term had expired, and this suit is for the balance of salary due under his contract of employment.

An exception of no cause or right of action was filed by defendant and overruled. Defendant then filed its answer, and plaintiff filed a plea of estoppel and motion to strike irrelevant and inconsistent allegations from the answer, which was sustained. Plaintiff next took a rule on defendant for judgment on the pleadings. Upon the trial of this rule, judgment was rendered in plaintiff's favor, and defendant appealed.

The authority for appointing an assistant superintendent is vested in parish school boards by section 43 of Act No. 100 of 1922. The pertinent portion of the section reads as follows, viz.:

"The parish school boards shall have the authority to appoint such assistant superintendents, supervisors, stenographers, and bookkeepers as may be needed, and such attendance officers, medical directors, and such other appointees as may be necessary for the proper and efficient conduct of the schools, . . . and to fix their salaries and prescribe their duties."

On July 14, 1932, the defendant school board adopted a resolution rescinding plaintiff's contract and abolishing the office of assistant superintendent, after declaring that plaintiff's appointment should have been made only to the end of the current fiscal

year; that the office was unnecessary, and there were no duties to be performed requiring an assistant superintendent; that there were no funds to be collected during the current fiscal year with which to pay the salary of such an officer, and no funds had been or would be budgeted for the office.

Each parish school board is authorized to employ a parish superintendent for a period of four years. Section 19 of Act No. 100 of 1922. And each parish school board is also authorized to employ teachers by the month and by the year and to fix their salaries. Section 20 of Act No. 100 of 1922. As to the other employees of parish school boards which the Legislature has authorized under section 43 of Act No. 100 of 1922, including assistant superintendents, no terms are fixed, and they may be employed as needed in the discretion of the boards.

The controlling question presented by the case is whether the defendant school board under a statutory provision authorizing it to employ an assistant superintendent as needed was empowered to fix by resolution the tenure of office of plaintiff as assistant superintendent at seventeen and one-half months and thereby divest itself of its discretionary power to terminate plaintiff's employment before the expiration of the term.

The universally accepted rule is that, where the tenure of the office is not prescribed by law, the power to remove is an incident to the power to appoint. The tenure not having been declared by law, the office is held during the pleasure of the authority making the appointment. 22 R.C.L. § 266, p. 562; 46 C.J. § 146, p. 985.

In Peters v. Bell, 51 La.Ann. 1621, 26 So. 442, 445, plaintiff sued to be reinstated in the office of assistant city engineer, from which he was removed by an order of the city engineer. The court found that the city engineer had the power to appoint his deputies, and held that, until the power was lodged elsewhere, he had the right to remove them. The court said: "When the officer is a deputy (employed by his principal) whose tenure of office was not fixed, in the absence of any statutory provision, the power to remove him was incidental to the power of appointment." The court then referred to and commented upon a number of decisions from other jurisdictions bearing upon the power of removal and upholding the principle that, where the tenure is not fixed by law, the office is held at the pleasure of the appointing authority.

In Ehret v. Police Jury, 136 La. 391, 67 So. 176, the police jury removed its secretary. The secretary sued for the balance of his salary, alleging he was employed for four years and was discharged without cause or ground of complaint after serving

only five months. The court, quoting section 2743, subd. 11, of the Revised Statutes, held that the police jury was authorized to summarily remove any of its appointive officers. And the court said that the power of removal conferred by law entered as much into plaintiff's employment as did the power of appointment.

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The implied power to remove cannot be contracted away so as to bind the appointing authority to retain a minor officer or employee for a definite, fixed period.

In Wright v. Gamble, 136 Ga. 376, 71 S.E. 795, 35 L.R.A.,N.S., 866, Ann.Cas.1912C, 372, the Supreme Court of Georgia held that, where the tenure of an office is not prescribed by law, the power to remove is an incident to the power to appoint. In such case the appointee holds at the pleasure of the appointing power, although it attempts to fix a definite term; and no formalities, such as the preferring of charges or the granting of a hearing to the incumbent, are necessary to the lawful exercise of the authority of removal. The court cites numerous authorities supporting the principle. Among these cases are State ex rel. Moore v. Archibald, 5 N.D. 359, 66 N.W. 234, 235, and Parsons v. Breed, 126 Ky. 759, 104 S.W. 766, 768.

In the Moore Case it was held: "The grant of power to appoint to public office, where no term of office is fixed by law, carries with it as an incident the absolute power of removal at any time, without notice or charges or a hearing, and without the cause for removal being inquired into by any court. Such power vested in a board cannot be limited by any action taken by such board, whether by appointing the officer for a fixed term, or by by-laws restricting the power of removal to cases where cause for removal exists."

In the Parsons Case it was held that, "where neither the Constitution nor statute fixes the term of office, the appointee holds at the pleasure of the appointing power, although it was attempted by the appointing power to fix a definite term."

In Peters v. Bell, 51 La.Ann. 1621, 26 So. 442, supra, this court cited with approval People v. Hill, 7 Cal. 102, holding that the power of removal cannot be divested or taken away, except by the term of the statute.

In the Ehret Case, supra, the court said that the law entered into the contract of employment, and the police jury had no capacity to avoid the law or abrogate its functions with respect either to the power of appointment or the power of removal. "If it were otherwise," said the court, "an incoming police jury might impose upon its successors in office a secretary who would

be unacceptable to the new members and out of sympathy with the policy of the body."

In Kirkpatrick v. City of Monroe, 157 La. 645, 102 So. 822, the municipality contracted with plaintiff, an engineer, to plan and supervise the construction of extensions and improvements in its utilities and public works. The contract was for four years; the city binding itself to pay plaintiff in monthly installments the amount stipulated. Plaintiff sued for the balance of the salary or wages which he would have earned had the contract not been breached by the defendant.

This court held that the contract was one ultra vires of the municipality; that the city council may employ persons to discharge certain duties as occasion arises, and create and appoint persons to fill minor offices deemed necessary for the proper administration of the city's affairs, but it also may discharge such employees and remove such officers at its pleasure.

Plaintiff argues that the Ehret and Kirkpatrick Cases are inapplicable here, because under the statutes involved in those cases the appointing authorities were expressly authorized to remove at their pleasure any officer or employee elected or appointed by them.

But, in our opinion, it makes no material difference that the statutes reviewed in those decisions expressly conferred upon the appointing authorities the unlimited power of removal which would otherwise have been conferred upon them by necessary implication. In either case, the legal principle is the same, although greater emphasis may be placed upon the legislative policy in the one case than in the other.

The legislative policy evidenced by section 43 of Act No. 100 of 1922 and deducible from its terms is that parish school boards shall be in a position to supervise and control its appointees, with a view to the proper and efficient conduct of the schools. For that reason, the Legislature provided that the appointment or employment of persons under the statutory provision should be as they were needed or as may be necessary. There was no intention on the part of the Legislature that a parish school board should tie its hands by a contract entered into possibly before the election of one or more of its members, but the intention was plainly that the board should at all times be unhampered in its supervision and control of such appointees.

Our conclusion is that the exception of no cause of action is well-founded and it should be sustained. This conclusion makes it unnecessary for us to dispose of the plea of estoppel filed by plaintiff.

For the reasons assigned, the judgment appealed from is annulled; the exception of no cause of action is sustained; and plaintiff's suit is dismissed at his costs.

The recall is a political device and is not tied to causes for removal in a legal sense. State ex rel. Hackley v. Edmonds, 150 Ohio St. 203, 80 N.E.2d 769 (1948). The procedure is usually initiated by a petition signed by a required percentage of voters. If a sufficient petition is filed a special election must be called. The extent of the authority of the officer receiving a petition to determine its sufficiency depends upon the statute. His function may be deemed strictly ministerial, which would preclude his inquiring into the qualifications of petitioners. Karwick v. Grazewski, 253 Mich. 110, 234 N.W. 168 (1931). On the other hand, it may be considered that he has a genuine discretion the exercise of which is a final determination as to sufficiency of a petition, absent fraud and bad faith. State ex rel. Goodhope v. Leyse, 60 S.D. 384, 244 N.W. 529 (1932).

In view of the political character of the recall administrative power to determine the sufficiency of a petition would hardly be thought to apply to the stated grounds for recall unless the statute plainly said so. In State ex rel. Landis, Atty. Gen., v. Tedder, Circuit Judge, 106 Fla. 140, 143 So. 148, 150 (1932), the court had this to say: "The sufficiency of the charges for the recall of a public officer to cause the voters to require his removal is a political question to be determined by the people. But the illegality of the proceedings therefor, and whether those attempting to act against the officer have complied with the law, is a judicial question for determination by the courts. An action will therefore lie to enjoin the holding of a recall election when the ground is that the provisions of the statute authorizing the election are not being complied with, and no other plain, complete, and adequate remedy at law exists for the protection of the rights of complainant. See Gibson v. Campbell. 136 Wash. 467, 241 P. 21; Leslie v. Griffin (Tex.Civ.App.) 23 S.W.2d 535."

In some states the sole proposition submitted at a recall election is the bare question of recall. See, for example, La. Const. of 1921, Art. IX, § 9; Roy v. Board of Supervisors of Elections of Parish of Lafayette, 198 La. 489, 3 So.2d 747 (1941). In others the election of a successor may be combined with the question of recall. So it was under the California statute applied in Martin v. Board of Trustees of Menlo Park, 96 Cal.App. 705, 274 P. 1015 (1929).

The authority to suspend local officers, or employees pending disciplinary proceedings or action for removal, is quite important. A person in whose hands the public interest might be in jeopardy is, by suspension, disabled from doing harm. If, moreover, he is vindicated, on final determination, he will not ordinarily have been seriously prejudiced. Summary suspension may be justifiable where summary removal would not be. There is authority that the power to suspend is incidental to the power to remove, but this position has not gone unchallenged. The cases are discussed in 2 McQuillin, Mun. Corps. § 586 (Rev. vol. 1939). Express statutory authorization for suspension is common, sometimes as a disciplinary measure, but more often as a means of safeguarding the public interest pending formal action.

SECTION 2. EMPLOYEES

A. MERIT SYSTEM

Public administration demands a permanent staff of professional public employees. It is the well-known aim of civil service systems to assure the public service competent personnel selected and promoted on a merit basis without regard to political considerations. Elective officials, judges, top-ranking administrative officers whose work is thought to be at the policy-making level, and temporary personnel are not included. The fact that a position requires the services of a member of a learned profession does not preclude its inclusion in the classified service. Architects, engineers, doctors and nurses, and, more recently, lawyers have, at the federal level, been brought within the merit system.

The actual security of tenure of a civil service employee or a teacher subject to the provisions of a teachers' tenure law depends, of course, upon the particular statute. The "rights" of the individual may be entirely statutory, without any element of contract, and if so, the legislature may go so far as to repeal the enabling statute and destroy his civil service status. State ex rel. Munsch v. Board of Com'rs of Port of New Orleans, 198 La. 283, 3 So.2d 622 (1941). Under the normal pattern the merit system employee may be removed only for cause. Some statutes contain inclusive lists of the types of legal cause such as (1) incompetency, (2) neglect of duty and (3) dishonesty.

Cases arising under teachers' tenure laws have given the United States Supreme Court not a little trouble. In Phelps v. Board of Education of West New York, 300 U.S. 319, 57 S.Ct. 483 (1937), the Court was called upon to decide whether a New

Jersey statute, which permitted the reduction, for the period July 1, 1933, to July 1, 1934, of the salaries of school teachers enjoying indefinite tenure under a pre-existing statute, impaired the obligation of contracts of employment with such teachers in violation of Section 10 of Article I of the Federal Constitution. The tenure statute provided:

The service of all teachers, principals, supervising principals of the public schools in any school district of this State shall be during good behaviour and efficiency, after the expiration of a period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board; . . . No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her . . . and after the charge shall have been examined into and found true in fact by said Board of Education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing. . . .

The challenge to the act was made by teachers on tenure whose salaries had been reduced pursuant to that measure. It appeared that it was not the practice, after a teacher had served in a school district under yearly contracts for three years, for any further formal contract to be made with the teacher. In rejecting the attack upon the later statute and upon the action pursuant to it the Court had this to say:

Although after the expiration of the first three years of service the employee continued in his then position and at his then compensation unless and until promoted or given an increase in salary for a succeeding year, we find nothing in the record to indicate that the board was bound by contract with the teacher for more than the current year. The employee assumed no binding obligation to remain in service beyond that term. Although the act of 1909 prohibited the board, a creature of the state, from reducing the teacher's salary or dismissing him without cause, we agree with the courts below that this was but a regulation of the conduct of the board and not a term of a continuing contract of indefinite duration with the individual teacher.

The Supreme Court reached a different conclusion in the case of Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 58 S.Ct. 443 (1938), with respect to an amendment to a teachers' tenure law of Indiana by which the legislature purported to render the law inapplicable to township schools. The Indiana act, however, was

liberally sprinkled with the jargon of contract. It provided that after a school teacher had served under contract for five or more successive years and thereafter entered into a contract for further service he thereby became a permanent teacher. It was provided that the public body might cancel the contract of a teacher enjoying tenure after notice and a hearing for incompetency, insubordination, neglect of duty, immorality, justifiable decrease in the number of teaching positions, or other good or just cause. The teacher, it was further provided, might cancel only upon five days' notice and might not cancel during the school term nor for a period of thirty days prior to the beginning of any term. The Indiana court had interpreted the amendatory statute as giving the school authorities absolute powers of dismissal with respect to teachers in township schools who were on tenure. The Supreme Court took the position that the word "contract" was used in the tenure law in its usual legal meaning and since that rendered a teacher's indefinite tenure a matter of contract, the Court logically proceeded to the conclusion that the amendatory statute, as interpreted by the Indiana court, impaired the obligation of the employment contract. The Phelps case was distinguished on the basis of the differences in the Indiana and New Jersey tenure laws.

Two classes of persons have been the subject of special treatment. Veterans are preferred while married women have been the objects of discrimination. Most of the litigation involving veterans' preferences has related to veterans of World War I or earlier conflicts. For obvious reasons we can expect a great deal more with respect to the interests of veterans of World War II. Favored treatment under merit systems has been upheld but there is a limit to it. If a veteran meets the minimum qualifications as by passing a competitive examination, he may be preferred over a non-veteran who outscores him. The cases are collected in Note 161 A.L.R. 494 (1946). If, however, the statute enables him to qualify even though he does not meet the minimum general standards, as where he is donated points on a competitive examination, the likelihood is that the preference will be deemed a special privilege of the sort banned by many state constitutions. Carney v. Lowe, 336 Pa. 289, 9 A.2d 418 (1939). Query: Would one prejudiced by such a preference be denied the equal protection of the laws guaranteed by the Fourteenth Amendment?

The Supreme Judicial Court of Massachusetts has upheld a rule, established by a school committee, which embodied a policy against the employment of married women as teachers, and which provided that a married woman, including one already in service, should not thereafter be appointed as a permanent teacher, except one already in service who could prove to the satisfac-

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tion of the committee that she was living apart from her husband and receiving no support from him or that he was so disabled as to be unable to support her. Houghton v. School Committee of Somerville, 306 Mass. 543, 28 N.E.2d 1001 (1940). The complaining teacher in that case was married and had been when the rule was adopted. She was dismissed under the rule. The governing statute made her subject to dismissal for "good cause." The court thought that the committee rule, confined as it was to a single kind of public employment, might have some relationship to the public welfare and, thus, was within the policy-making power of the committee. The same result has been reached in a four-to-three decision under an Ohio teachers' tenure act which specifies particular causes for removal and adds the catch-all, "or for other good and just cause." Greco v. Roper, 145 Ohio St. 243, 61 N.E.2d 307 (1945). The dissenters made a strong argument that the catch-all should be limited, by application of ejusdem generis, to matters affecting a teacher's fitness akin to those specified. The Supreme Court of Missouri has recently overthrown as unreasonable and arbitrary a local board of education rule providing for the removal of a woman teacher who married. State ex rel. Wood v. Board of Education of City of St. Louis, 206 S. W.2d 566 (1947). The wonder is that such a rule had survived that long in a period of teacher shortage. If the grounds of removal are specified in the statute, without a general or catch-all clause, one's marital status plainly cannot be made a ground for dismissal unless within the specification. Goff v. School District of Borough of Shenandoah, 154 Pa.Super. 239, 35 A.2d 900 (1944). Knox County v. State ex rel. Nighbert, 177 Tenn. 171. 147 S.W.2d 100 (1940).

More recently the Massachusetts Court has invalidated a municipal ordinance, which provided that, with limited exceptions, no married woman should be employed in any department of the city. That discrimination, applicable to the municipal classified service generally, was simply too much; the court could not discern in it any substantial relation to the public welfare. Mayor of City of Somerville v. District Court of Somerville, 317 Mass. 106, 57 N.E.2d 1 (1944); 25 Bos.Univ.L.Rev. 59 (1945).

Section 10 of Article XV of the Constitution of Ohio is obviously patterned upon the New York civil service provision. It does not, however, apply to villages. It reads, in part: "Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations." The Akron charter, taken literally, put assistant directors of law and police prosecutors in the classified service. In a test case that interpretation was rejected to avoid a serious con-

stitutional question. The court did not consider it "practicable" to select such personnel by competitive examination, especially since they occupied a fiduciary relation to the director of law. De Woody v. Underwood, 136 Ohio St. 575, 27 N.E.2d 240 (1940). The Federal Government has not found it impracticable to apply the merit system to legal positions. Henry Weihofen, "The Written Federal Attorney Examination" 11 Univ. of Chi.L.Rev. 154 (1944); Ralph F. Fuchs, "Post War Problems of the Legal Profession From the Standpoint of Civil Service Examining Agencies" 19 Ind.L.J. 316 (1944). The question arises whether the practicability test is simply a minimum requirement. If competent legislative authority determines that the merit system can be applied to particular personnel is there a basis for judicial consideration de novo of "practicability"?

CIVIL SERVICE TECHNICAL GUILD v. LA GUARDIA

Supreme Court of New York, Special Term, New York County, 1943. 181 Misc. 492, 44 N.Y.S.2d 860, affirmed 267 App.Div. 860, 47 N.Y.S.2d 114 (1944), 292 N.Y. 586, 55 N.E.2d 49 (1944).

Proceeding in the matter of the application of the Civil Service Technical Guild and Claude H. Rowles for an order against Fiorello H. La Guardia and others, constituting the Board of Estimate, Thomas J. Patterson, Director of the Budget, and Harry W. Marsh and others, constituting the Municipal Civil Service Commission, to compel a discontinuance of engagement of private engineering and architectural firms and to require appointment of engineering and architectural employees from civil service eligible list to perform work of drawing plans for post-war public improvements.

Application denied and petition dismissed. . . .

Pecora, Justice. In preparation for a readjustment from a war-time to a peace-time economy, the City of New York, like the Federal and State governments, in June 1942 adopted a post-war Planning Program which contemplates public improvements costing some \$700,000,000. This emergency program calls for current expenditures of \$25,000,000 for the preparation of plans and specifications for such projects, which plans, it is hoped, will be completed by June 1944. In carrying forward this program, the Board of Estimate has allocated about \$5,000,000 for the award of contracts to private engineering and architectural firms in the City of New York. At the time of the institution of the within proceeding approximately 90 such contracts had been awarded, totalling about \$2,600,000. The petitioners herein include a person who is an engineer on a preferred list, and an as-

sociation of competitive civil service employees in the architectural and engineering service of the City of New York and its They bring this proceeding under Article 78 of the Civil Practice Act to compel a discontinuance of the engagement of the private engineering and architectural firms and their staffs upon a contract basis and to require the appointment of engineering and architectural employees from civil service eligible lists, or according to civil service rules, to perform said work. though voluminous affidavits and exhibits have been filed upon this application, it appears that the only question to be determined is one of law, viz., whether there has been a violation of the provisions of Article V, Section 6, of the State Constitution. It is there provided: "Appointments in the civil service of the state, and cities shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive.

The reasons for the action taken by the Board of Estimate, advanced in the answering affidavits, are pertinent only to the question of whether there has been any arbitrary or capricious exercise of a power. The contracts attacked were evidently entered into to meet technical problems for which private firms were especially equipped to master, to accelerate the completion of plans, and to assist in preserving intact many private engineering and architectural organizations that would otherwise be dispersed to the great detriment of the City. It is clear from the undisputed facts that the power of the Board of Estimate was wisely exercised, and were this court permitted to review such discretion it would confirm the action taken. There is presented, however, the legal issue of constitutional infraction.

In approaching the problem certain unmistakable signs along the road point to the correct solution. Since the organization of the City of New York in 1897, it has been a practice, when deemed advisable, to award contracts for private architectural and engineering services. The difficult architectural and engineering problems involved in the construction of public improvements demand the highest degree of specialized professional skill for their solution. The City for years has searched among those with experience and talent to meet the requirements of design and construction called for by the nature of the particular improvements under consideration. This long standing practice constitutes a practical construction of the Constitutional provision dealing with civil service. Whenever the power to award such contracts has been challenged, courts have approved the practice.

⁶ Citation of authorities omitted.

Moreover, the award of contracts for architectural and engineering work does not constitute a method for making "appointments" in the "civil service" of the City. The provisions of the contracts awarded do not create any employer-employee relationship but a contractual one between an independent contractor and the City. The contracts call for specific studies, plans and specifications. The City does not control the office organizations of such firms, has nothing to do with the persons they employ, does not prescribe hours of employment, and is not their sole client.

The distinction between bona fide contracts with independent contractors and appointments to positions in the civil service is clearly pointed out in Matter of Meadows v. Triborough Bridge Authority, supra. In that case there was a challenge to the power of the Triborough Bridge Authority to award contracts for architectural and engineering services. As here, the Constitutional provision was advanced as an impediment to such power. The court there pointed out that the services of architects and engineers in drawing up plans were of a temporary and transient nature, while, as stated in Matter of Social Investigator Eligibles Association v. Taylor, 268 N.Y. 233, page 237, 197 N.E. 262, 264, "the command of that section [Article V, Section 6] is addressed to conventional and stable duties of the functionaries of civil government."

So, too, in Matter of Drummond v. Kern, 176 Misc. 669, 27 N.Y. S.2d 332, the court upheld the validity of a contract between the corporation counsel and a photographic firm for the furnishing of photographs whenever required. The furnishing of plans and specifications are in some respects similar to the making of photographs.

Matter of Curran v. Board of Education, supra, involved the construction of Section 683, sub. 4, New York City Charter (L. 1937, Ch. 922), which permitted the employment by the Department of Public Works of private architects in a consulting or advisory capacity where the cost of the building was to exceed \$100,000. While it is true that the court, in upholding the right of the Department to engage architects in private practice for architectural services beyond mere advice, was construing a special statute, it must be obvious that if the practice violated the Constitutional provision, the statute would be subject to the same infirmity.

Hardecker v. Board of Education, supra, presents a case dealing with contracts which are part of the Post-War Program. Section 451, sub. 4, Education Law, permits the Board of Education to employ architects in private practice. The court upheld the

Board of Estimate in its determination that the design and construction of certain Board of Education projects in the Post-War Program should be let to architects and engineers engaged in private practice. Here, too, it is no answer that a special statute was under consideration. The constitutionality of the procedure must have been approved or else the statute would have been declared invalid.

The case of Turel v. Delaney, 285 N.Y. 16, 20, 32 N.E.2d 774, 776, is clearly distinguishable. There the contract in effect provided for regular-salaried, full-time employment of physicians and nurses to carry on the day by day treatment of injured employees of the Board of Transportation. Such treatment was required by law, and was in every sense part of the "conventional and stable" duties of the department to which "the command" of Article V, Section 6, is addressed. Furthermore, in that case it was conceded that the Board of Transportation could "have enlisted a capable medical and surgical organization by means of competitive examinations." In the instant proceeding the work involved is highly specialized temporary work.

Finally, the public policy of the state as expressed in Section 451, sub. 4, Education Law, and Section 683, sub. 4, N. Y. City Charter, heretofore mentioned, gives tacit approval to the practice of using private architectural and engineering firms. A further expression of such policy appears in Ch. 660, Laws of 1943, where the Legislature gives power to the State Superintendent of Public Works to employ private engineers and architects in connection with State projects ordered by the State Post-War Commission. In 1937, the Legislature passed a bill aimed at the identical purpose of the instant proceeding. (S Int. 2021, Pr. 2473.) The bill provided that services of private architects or engineers could be used only in an advisory or consultant capacity. Governor Lehman vetoed the bill, and in the memorandum accompanying the veto, the Governor said in part: "In effect, if approved, this bill would unduly hamper administrative officials of the State and local units of government from exercising judgment as to the use of private architects or engineers. In my opinion it is important to keep the door open so that if a unit of government desires to use private architects or engineers to do an entire job in special cases, government may do so. It is important that the State of New York and its municipalities maintain the highest standards of architectural and engineering achievement."

Similar bills have been introduced every year since 1937, but none has passed the Legislature.

I therefore conclude that nothing contained in the Constitution of the State of New York or in the provisions of the Civil Service Law prohibits the City of New York from awarding contracts for architectural and engineering services to private concerns in connection with the Post-War Planning Program. This Court further holds that the action of the City attacked herein is in line with sound public policy and represents a wise exercise of discretion. The application, therefore, is in all respects denied, and the petition dismissed. Settle order accordingly.

The initiation of a merit system presents a problem as to what to do about personnel then in service. They can be "covered in" without competitive examination unless there is a particular obstacle in the constitution. In New York the constitutional provision for civil service has presented difficulties but the Court of Appeals has found the "practicability" clause flexible enough to permit a gradual extension of civil service to local units, which involved "covering in" village policemen in service at the time of the extension of civil service to villages. In the Matter of Ricker v. Village of Hempstead, 290 N.Y. 1, 47 N.E.2d 417 (1943); 43 Col.L.Rev. 410 (1943).

City home rule charter provisions on civil service prevail in Ohio over the general statute, with certain important exceptions. Fire, police and health protection are deemed state concerns and the general statute governs in those areas. The general law is supreme as to judicial review of administrative action in civil service matters. The Ohio cases are discussed by J. B. Fordham and Joe F. Asher, "Home Rule Powers in Theory and Practice" 9 Ohio St.L.J. 18, 39 (1948).

STATE OF WASHINGTON ex rel. JOHN REILLY v. CIVIL SERVICE COMMISSION OF CITY OF SPOKANE

Supreme Court of Washington, 1941. 8 Wash.2d 498, 112 P.2d 987.

SIMPSON, JUSTICE. In this case a writ of mandate was sought by three members of the police force of the city of Spokane to compel the civil service commission of that city to classify positions in the police department according to a list submitted by them, and to provide an eligibility list from which vacancies might be filled for each position by open, competitive and free examinations as to fitness, and on the basis of merit, experience, and record. Particular emphasis was directed toward the position of detective, or plain-clothes man, which was alleged to be a distinct classification from that of patrolman, requiring additional ability.

experience and training. It was alleged that this position was being filled by "transfers", without competitive examinations, and that such "transfers" actually were promotions.

The trial court, after making findings of fact and conclusions of law, dismissed the action.

The numerous assignments of error are all directed to one question, namely, whether the civil service commission can be compelled by the court to give separate classification to designated positions in the police department.

Article VI, Section 53, of the charter of the city of Spokane, reads as follows:

"The commission, with the approval of the council, shall make such rules and regulations for the proper conduct of its business as it shall find necessary and expedient. The commission, among other things, shall provide for the classification of all employees, except day laborers and the appointive offices mentioned in sections twenty-four (24), twenty-five (25) and thirty-two (32) of this charter; for open competitive and free examination as to fitness; for an eligibility list from which vacancies shall be filled, for a period of probation before employment is made permanent; and for promotion on the basis of merit, experience and record.

"Employees within the scope of this article who are in office at the time of the adoption of this charter shall retain their positions, unless removed for cause.

"The council may, by ordinance, confer upon the commission such further rights and duties as may be deemed necessary to enforce and carry out the principles of this article."

The trial court found that the commission had classified the positions in the police department into three grades: patrolman, sergeant, and captain. Appellants, however, contend that this classification is inadequate, and that the position of detective, in particular, is so distinct that the court should compel the commission to establish additional classifications.

The evidence shows that at the present time the chief of police details or assigns patrolmen to plain-clothes duty, and that when a patrolman is detailed to that duty, he receives eleven dollars per month more salary than when in uniform. It was also shown that detective work requires special capacities, in so far as personality, dependability, initiative, intelligence, and experience are concerned. The duties which are performed by detectives differ from those of plain patrolmen in that the detectives usually are put to work on cases after crimes have been committed, whereas the patrolmen walk a beat and their function is to a large extent the prevention of crimes and the preservation of the peace.

Since no evidence relative to the other positions enumerated in the petition for additional classifications was presented, we will confine our opinion to the position of detective or plain-clothes man, which is now included in the commission's classification of patrolman.

This court has often stated the rule relative to the issuance of writs of mandate in matters involving discretion on the part of a public agency against whom the mandate is sought. The following quoted portion of State ex rel. Yeargin v. Maschke, 90 Wash. 249, 155 P. 1064, 1065, is an excellent statement of our rule: "The general rule, of course, is, that the discretionary power of the board of county commissioners is not subject to review by the court. But this is not a universal rule. If the action of the board of county commissioners is arbitrary or capricious. or if its action is prompted by wrong motives, there is not only an abuse of discretion, but in contemplation of law there has been no exercise of the discretionary power. If an honest discretion, as demanded by the law, has not been exercised, the result is to substitute arbitrary action for such discretion. If a tribunal such as the board of county commissioners acts arbitrarily, or refuses to exercise its discretion, the law will by mandamus require it to exercise its discretionary power. . . . "

The question with which we are confronted is whether the civil service commission abused the discretion vested in it by the charter when it classified the police force as it did, including those men who are engaged in detective work under the grade of patrolman.

The contention of respondents is that when a man is assigned to detective work, it is simply a "detail", rather than a "promotion", and that there is no difference in rank between those doing detective work and those in the uniformed part of the department. This view was recognized in the case of People ex rel. O'Connor v. Girvin, 227 N.Y. 392, 125 N.E. 587, 588, in which one who had been assigned to detective work was put back into the uniformed branch of the department. The rules of the commission required written charges to be made when demotions took place, and the policeman claimed that he had been demoted, and that no charges had been filed. In denying his petition for a writ of mandate, Judge Cardozo stated: "Detective sergeants thus remained what they had always been before. They were patrolmen detailed to duty as detectives. They were confirmed in the rights which were already theirs, and in no others. We have little doubt that this construction of the statute promotes the discipline and efficiency of the police force, and ought, therefore, to be preferred if the meaning is uncertain."

Although we are of the opinion that the commission might very well have classified the detective branch separately, in view of the differences between the duties, salaries, and requirements of the groups, we do not feel that the commission's classification was so palpably erroneous as to warrant our interference with its discretion. The distinction in duties and requirements, although substantial, is not unreasonable, nor is the salary difference an extreme one. It should be noted that in People ex rel. O'Connor v. Girvin, supra, the men detailed to the detective division also received a higher salary than the uniformed patrolmen, but that fact did not affect the outcome of the case. Since the civil service commission was not acting in a manner palpably illegal and no abuse of discretion was shown, the courts have no jurisdiction to interfere with the classification.

The judgment of the trial court is affirmed.

ERVIN v. TRIPLETT

Supreme Court of Iowa, 1945. 236 Iowa 272, 18 N.W.2d 599.

Wennerstrum, Justice. Plaintiff brought an action at law on a petition for a writ of certiorari thereby seeking to determine the right of the plaintiff, a police department patrolman holding civil service status in the City of Des Moines, to retain a rank or rating on the police force as a detective by virtue of the Soldiers' Preference Act. The plaintiff, as will be herein shown, previously held the position of patrolman but was thereafter assigned and transferred to that of detective. After holding the position of detective for a period of time he was again reassigned or transferred to that of patrolman which provided a lesser compensation. The trial court, upon submission of this cause, entered a judgment ordering the defendant to restore the plaintiff to his former detective duties. The defendant has appealed.

The appellee is an honorably discharged soldier of World War I. The record discloses that he has been on the police force in the City of Des Moines for 21 years; that he held a civil service rank in this department as patrolman which carried with it the compensation of \$180 per month. It is shown that in April 1926 he was assigned to the position of detective and that after a period of six months he asked to be put back as patrolman. It is also shown by the record that on February 1, 1941 he was again assigned as a detective, that thereafter he was reassigned as a patrolman on July 16, 1941, then assigned as detective to the liquor and vice bureau April 16, 1942, then transferred to the position of detective April 4, 1944. It is further shown that the

appellee was thereafter transferred to the position of patrolman June 12, 1944. It is shown that the compensation of a detective was \$190.75 per month which is \$10.75 more compensation than that which the position of patrolman provided.

It is conceded that the appellee has a civil service rating as patrolman in the City of Des Moines, Iowa. It is also admitted that the appellee, through his attorney, notified the appellant by mail that he claimed his assignment or transfer from his prior duties as a detective to the duties of patrolman was illegal under the Iowa Soldiers' Preference Law. It is appellee's claim that the transfer to that of patrolman was illegal in that there were no charges filed against him asserting that he was guilty of any incompetency or misconduct. It is shown that no hearing was held bearing upon either his incompetency or misconduct and no notice was given him whatsoever of the contemplated transfer, which action he claims was required under the provisions of the soldiers preference law. It is further contended on behalf of the appellee that the appellant in removing him from the office of detective acted illegally and in excess of his jurisdiction and authority under the provisions of section 1163 of the 1939 Code of Iowa, and the other provisions of chapter 60 thereof.

It is the appellant's contention that the appellee was not demoted or removed from office but was merely transferred from one division or rank of patrolman to the other and it is denied that appellant acted illegally or in excess of his jurisdiction or authority. The appellant further contends that he merely transferred the appellee from the position of a detective, which involved a confidential relationship, to the position of a uniform patrolman which had been the custom and practice followed in the City of Des Moines for many years past, and that the appellee had been many times so transferred. It is further contended that this transfer involved no demotion or discharge from any office which the appellee claimed to occupy.

The question which is presented to us for review involves the legal authority of the superintendent of public safety in a commissioned governed city in the State of Iowa to assign a civil service patrolman to detective duties and to thereafter transfer him to a position that paid less compensation without notice or hearing of stated charges and, in the instant case, the removal or reassignment, within the police department to a position that paid less compensation, of one who is an honorably discharged soldier of World War I.

The principal difference of opinion between the appellee and appellant is that the appellee contends that the provisions of the general Soldiers' Preference Law (chapter 60) are applicable under the facts in this particular case while the appellant maintains

that under the record and the facts as disclosed the general Soldiers' Preference Law is not involved.

I. It is the contention of the appellant that it was error on the part of the trial court to hold that the appellee, Ervin, was illegally demoted from the office of detective to that of patrolman. It should be kept in mind that the appellee received his original appointment of employment by reason of qualifying as a civil service employee. Section 5697, which is found in Chapter 289 of the 1939 Code, and which chapter relates to civil service employment in certain cities, states: "Preferences. In all examinations and appointments under the provisions of this chapter, honorably discharged soldiers, sailors, or marines of the regular or volunteer army or navy of the United States shall be given the preference, if otherwise qualified."

It is contended by the appellant that the position of detective is not such a position in the Des Moines police force as is contemplated by the provisions of the civil service act in that there is no examination necessary under the procedure employed in the City of Des Moines for that particular type of service. It is further contended that the position of detective is merely a division within the duties of a patrolman in the Des Moines police department.

It is the appellee's claim that the statutes incorporated in the general Soldiers' Preference Act, Chapter 60, of the 1939 Code are the ones that are applicable and must be followed. The particular sections that the appellee contends should be given consideration are as follows:

"1159. Appointments and promotions. In every public department and upon all public works in the state, and of the counties, cities, towns, and school boards thereof, including those of cities acting under special charters, honorably discharged soldiers, sailors, marines, and nurses from the army and navy of the United States in the late civil war, Spanish-American war, Philippine insurrection, China relief expedition, or war with Germany, who are citizens and residents of this state, shall, except in the position of school teachers, be entitled to preference in appointment, employment, and promotion over other applicants of no greater qualifications."

"1163. Removal—certiorari to review. No person holding a public position by appointment or employment, and belonging to any of the classes of persons to whom a preference is herein granted, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, and with the right of such employee or appointee to a review by a writ of certiorari."

We do not find as between the special statute, section 5697 (the civil service statute) and the general statute found in Chapter 60 (the general Soldiers' Preference Act) that there is any inconsistency between the two which would require our holding that the special statute would control over the general statute.

In fact, there is nothing in the civil service statute, and particularly that which relates to soldiers' preference, which is inconsistent with the provision found in section 1163. This section sets out the necessity of specific charges being filed, and that notice of them and hearing thereon be had in case of a contemplated removal of a person, within the classes enumerated in section 1159 and who has been "holding a public position by appointment or employment." We feel that the general provisions of section 1163 should be given effect and that under the record as herein presented Ervin was removed from his position as detective without the provisions of section 1163 being followed.

In the case of Herman v. Sturgeon, 228 Iowa 829, 838, 293 N.W. 488, 492, we said: "Appellant also contends that a soldiers' preference does not apply to promotions under Civil Service. There is no merit in this. Section 1159, expressly refers to promotions. Section 5696.1 refers to 'promotional examinations', and Section 5697, in providing for preferences, expressly includes 'all examinations.'"

While it is true that the Herman case involved a promotion rather than a demotion, such as is involved here, we see no reason why the same principle is not applicable here.

II. Although appellant contends that the provisions of chapter 60 are not applicable he maintains that, if the court should determine that they are, the position of a detective on the police force in the city of Des Moines is one which entails a confidential relationship to the appointing officer and that by reason of this fact the provisions of section 1165 of the 1939 Code are applicable. This last referred to section states that the preference given to a soldier shall not apply ". . . to any person holding a strictly confidential relation to the appointing officer." The work of a detective may be of a confidential nature and his reports may be confidential to his immediate superior. However, the record does not in any way disclose that a person holding the position of detective such as was held by the appellee in this case is one of "strictly confidential relation to the appointing officer" which in the instant case is the commissioner of public safety.

We do not find in the record where the appellee did any work that was confidential to the commissioner and we are unable to reach the conclusion that the position of detective in the police department in the city of Des Moines is of such a confidential nature to the appointing officer as to come within the provisions of section 1165 of the 1939 Code. This case is not similar to Bowman v. Overturff, 229 Iowa 329, 294 N.W. 568, where it was held that the position of a jailer or turnkey was of a confidential nature to the sheriff, the appointing officer. . . .

III. It is contended that under section 6571 of the 1939 Code, which is in the chapter relating to government of cities by commission, the council is given full authority to prescribe the powers and duties of the officers and employees. It is contended that this statute gives full and complete power to the superintendent and to the council to operate the police department in an efficient and economical manner so long as the superintendent of public safety does not violate the civil service law. It is further contended that the adoption of the appellee's theory of this case would disrupt the police department of the city of Des Moines and would render it impractical, if not impossible, to conduct the business of the police department without having to settle the claims of any soldier that might come within the jurisdiction of that department.

To these several contentions as made by the appellant we can only say that the statute has given preference to men in previous military service. Provision has been made for the removal of individuals holding a soldier's preference whose separation from their position is sought. If the appellee's services were not of a nature to merit his continuation in his prior position, charges could easily have been placed against him. We find no merit in this last contention of appellant.

Upon a review of the entire record we have reached the conclusion that the trial court was correct in its ruling and judgment and that it should be affirmed.

Affirmed.

B. UNIONIZATION

In a draft of this section, prepared some eighteen months ago, it was stated that there could then be little doubt that, as a general proposition, government employees may organize themselves into unions. The observation was not unsupported. See Note 54 Harv.L.Rev. 1360 (1941). Postal employees gained clear recognition of their right to organize nearly forty years ago, when Congress adopted the Lloyd-Lee Follette Act. 37 Stat. 555 (1912), 5 U.S.C.A. § 652. In recent years thousands of federal as well as state and local employees have become mem-

bers of unions. The following table, reproduced from page 129 of the Municipal Year Book 1947, provides helpful data on the organization of city employees.

ORGANIZATION OF LOCAL EMPLOYEES IN CITIES OVER 10,000: JANUARY 1, 1947 TABLE 9

Population Group	No. of Cities In	Cities with Employees in One or More Organizations	8	No. Cities Ha Employees Affiliated Organi	ities Ha ployees Organiz	ving in ations 1		No. of Cities	No. of Cities with
	Croup	No. Per Cent	AFSCME		IAFF	NJCSA	CSFNY	Nonaffil. Org'ns	Agreement
Cities over 500,000	14	14		19	14	0	6	7	
250,000 to 500,000	92	-06			H (> 1	N	П	64
100 000 to 250 000	ў ў ў) I		٥.	18	Н	 i	10	ca
100,000 to 250,000	Ca	#c		Ħ	44	ေ	1	666	G
50,000 to 100,000	106	96		19	16	ĸ		Ē	3 (
25,000 to 50,000	212	177		2.6	148	0 0	H =	77	<u>ب</u>
10,000 to 25,000	662	306 43.9	20 87	. F.G	010	2 5	\$1 0	42	ත
All oiting ones 10 000	T T	100		i]	017	0]	N	51	19
ALL CILLES OVER 10,000	7017	,90		102	530	35	14	158	100

of America; IAFF, International Association of Fire Fighters; NJCSA, New Jersey Civil Service Association; 1 The total number of cities with employees in the several affiliated organizations exceeds the total number of cities having one or more organizations because there are many cities having employees in two or more organizations. AFSCME indicates American Federation of State, County, and Municipal Employees; UPWA, United Public Workers OSFNY, Civil Service Forum of New York,

In Hagan v. Picard, 171 Misc. 475, 12 N.Y.S.2d 873 (1939), affirmed 258 App.Div. 771, 14 N.Y.S.2d 706 (1939), the Greater New York Park Employees Association, an unincorporated group of municipal employees, obtained an order requiring the state Board of Standards and Appeals to approve a certificate of incorporation for the "mutual betterment, protection and advancement" of the members. The Board had denied approval because it was not convinced the purpose could best be achieved through the corporate form. The court concluded not only that the Board's function was ministerial but also that the organization of public employees was lawful. Justice Bergan had this to say of unionization: "I find nothing in the statute which renders unlawful the organization of public employees for their mutual welfare and benefit. They have the same right to mutual help and assistance that other citizens have—and to group themselves together for that purpose. Concededly the unincorporated form of organization of public employees is not unlawful. If it were, the units now in existence would be disbanded by public authorities and their members prosecuted. The distinction in principle between the unincorporated and the corporate form of mutual benefit groups is not apparent."

The post-war tendency, however, has run counter to freedom of organization by public employees. The latest report of the Committee on City Officer and Employee Problems of the National Institute of Municipal Law Officers categorically declares that "the majority of jurisdictions....have insisted that employees who work for municipalities do not have the right to join labor unions." Municipalities and the Law in Action-1948, 240, 241. Certainly there is a growing body of judicial authority supporting local governmental bans upon employee membership in unions. Especially is this so as to policemen and firemen. It is said, as to them, that they are a class apart because their responsibility to preserve public order demands that their loyalty to the public be complete and undivided. Carter v. Thompson, 164 Va. 312, 180 S.E. 410, 412 (1935). The point gains force where, for example, citizens may become associate members of a police officers organization. State Lodge of Michigan, Fraternal Order of Police v. City of Detroit, 318 Mich. 182, 27 N.W.2d 612 (1947); Fraternal Order of Police v. Lansing Board of Police and Fire Commissioners, 306 Mich. 68, 10 N.W.2d 310 (1943); cert. den. 321 U.S. 784, 64 S.Ct. 781 (1943). Other recent police officer cases include City of Jackson v. McLeod, 199 Miss. 676, 24 So.2d 319 (1946); certiorari denied 328 U.S. 863, 66 S.Ct. 1368 (1946); and Perez v. Board of Police Com'rs of City of Los Angeles, 78 Cal.App.2d 638, 178 P.2d 537 (1947). Concerning the denial of certiorari in the McLeod case it has

been said: "It is singularly significant to cities that the Supreme Court would not even take this question under advisement, and the action of the court should go a long way toward emphasizing the vast differences in the relationships of unions with private industry and their relations with government." Charles S. Rhyne, "City Legal Problems in 1946," Municipal Year Book 1947, 444, 445. It is fair to say that Mr. Rhyne represents the city attorneys' point of view. Did he overstress the Court's refusal to review the case?

Contrary to the trend is a pertinent provision of the New Jersey Constitution of 1947. Paragraph 19 of Article I (Rights and Privileges) reads as follows:

"Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing."

It is significant that New Jersey public employees are given a "right" to organize without any qualification as to civil service or the character of the particular employment.

The Court of Civil Appeals of Texas has upheld an ordinance of the City of Dallas which broadly forbade any city employee to become a member of a labor union, upon penalty of dismissal. Congress of Industrial Organizations v. City of Dallas, 198 S.W.2d 143 (1946). The court met the contention that the ordinance impaired freedom of speech, assembly and the press and the right of petition with the argument that individuals voluntarily accepting city employment assumed the obligations of the relationship even to the extent of waiving such rights. The court, moreover, to support its assertion that courts, the country over, had uniformly sustained regulations such as the Dallas ordinance, quoted with approval the following statement from the opinion in Railway Mail Association v. Murphy, 180 Misc. 868, 44 N.Y.S.2d 601 (1944): "To tolerate or recognize any combination of Civil Service employees of the government as a labor organization or union is not only incompatible with the spirit of democracy, but inconsistent with every principle upon which our Government is founded." The New York Supreme Court used that language in support of a decision that the Railway Mail Association, an organization of federal employees, was not a "labor organization" within the meaning of a New York statute forbidding a labor organization to discriminate against an individual worker by reason of his race, color or creed. As we have already seen, Congress recognized the right of postal employees to organize as long ago as 1912. The Texas Court

took no notice of the fact that the New York decision had been reversed in the Appellate Division and that the Court of Appeals and the Supreme Court of the United States had affirmed. Railway Mail Association v. Corsi, 326 U.S. 88, 65 S.Ct. 1483 (1945). See Tex.Civ.Stats. Art. 5154c, § 4 (Vernon, 1947).

What of the check-off? The Court of Appeals of Maryland has upheld the authority of the City of Baltimore to collect union dues on a strictly voluntary basis upon individual request. Mugford v. Mayor and City Council of Baltimore, 185 Md. 266, 44 A.2d 745 (1946). The case is discussed in 9 Md.L.Rev. 70 (1948). A contrary position has been taken in Ohio.

HAGERMAN V. CITY OF DAYTON

Supreme Court of Ohio, 1947. 147 Ohio St. 313, 71 N.E.2d 246.

[The Director of Finance of the City of Dayton sought a declaratory judgment against the city, a union of city public service employees and others, which would determine the validity of a Dayton ordinance the principal provisions of which read as follows:

"Whereas, many of the employes of the city of Dayton have presented to the director of finance signed authorizations requesting and authorizing the director of finance, as fiscal officer of said city, to deduct from their first pay check each month a sum of money to be paid by said director to the treasurer of the Dayton Public Service Union, which deductions or partial wage assignments are made terminable by the employee by giving ten (10) days written notice to said director; and

"Whereas, the charter of the city of Dayton provides, in part, that the city 'may pass such ordinances as may be expedient for maintaining and promoting the peace, good government, and welfare of the city and for the performance of the functions thereof:' and

"Whereas, said charter further provides that 'the city shall have and may exercise all other powers which, under the Constitution and laws of Ohio, it would be competent for this charter specifically to enumerate;' and

"Whereas, it is represented to this commission that these requests for union dues deductions, under a wage assignment plan, are for the exclusive benefit of the employes of the city of Dayton; and

"Whereas, it is necessary for the preservation of the public peace, property, health and safety that this ordinance take effect immediately upon its passage, therefore "Be it ordained by the commission of the city of Dayton:

"Section 1. That the director of finance of the city of Dayton be and he hereby is authorized, pursuant to the provisions of the charter of the city, to recognize said assignments of wages as a voluntary check-off on the wages of the employes of the city belonging to a labor union, as referred to in Section 6346-13 of the General Code of Ohio, and to deduct from the salaries or wages of such city employes as voluntarily subscribe to said plan such amounts monthly as shall have been stipulated by such employes in written authorizations or assignments filed with said director of finance requesting such deductions. The director of finance is also hereby authorized to make remittance to the treasurer of the Dayton Public Service Union of the aggregate amount of such sums so authorized to be deducted and to transmit the same to said labor union on or before the fifteenth day of the month following the date of such deductions."

The defendants' answers prayed judgment declaring the ordinance valid. The Court of Common Pleas entered judgment recognizing the plan of the ordinance as valid upon the governing body making provision from sources other than public funds for the expense of collecting the union dues. Plaintiff filed notice of appeal to the Court of Appeals. Thereafter the city commission adopted an ordinance directing the Director of Finance to withhold, from union dues collected, five per centum of collections as a fair and reasonable sum to cover cost of collection. By stipulation a copy of this ordinance was filed in the Court of Appeals. That court, in a decision on the law and the facts, adjudged that the check-off was valid. The Supreme Court, on plaintiff's appeal, sustained the jurisdiction of the Court of Appeals but reversed on the merits.

TURNER, JUDGE. . . . The principal question propounded by appellant is: "Did the Court of Appeals commit error when it found that the city of Dayton, Ohio, could enter into a valid agreement with its employees in favor of a labor union as contemplated by the language of Section 6346-13 of the General Code of Ohio relating to a check-off on the wages of such employees by the enactment of an ordinance providing for dues deduction?"

Section 6346-13, General Code (118 Ohio Laws, 656), provided at the time of the enactment of ordinance No. 15776:

"Notwithstanding the provisions of section 6346-12 of the General Code of Ohio, no assignment of, or order for wages or salary shall be valid if made after this act goes into effect . . . Nothing herein shall affect or invalidate any contract or agreement between the employers and their employes, or as between employers, employes, and any labor union as to any check-off on the wages of such employes as may be agreed upon."

The constitutionality of the foregoing section, or any part thereof, not having been challenged, we shall not pass upon that question.

Under Section 6346-13, General Code, as it stood at the time of the passage of ordinances No. 15776 and No. 15937, any assignment of, or order for, wages or salary was invalid in the absence of a contract such as described in Section 6346-13, General Code. We are of the opinion that a municipal corporation of the state of Ohio does not come within the meaning of "employers" as used in Section 6346-13, General Code. We are also of the opinion that civil service appointees do not come within the definition of "employees" as used in such section.

It is earnestly argued by appellees that the municipality has the power to enact the ordinance herein in question, under the home-rule provision of the Ohio Constitution, especially Sections 3 and 7 of Article XVIII thereof.

Section 3 provides:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

Section 7 provides:

"Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

Appellees argue that "the ordinance obviously isn't nor is it claimed to be a 'police, sanitary or other similar regulation." We cannot agree with this contention. The enactment of any ordinance which is aimed at the preservation of the health, safety, welfare or comfort of citizens of a municipality is the exercise of police power. Ordinance No. 15776 (with or without its supplemental ordinance No. 15937) is the exercise of police power. Ordinance No. 15776 conflicts with a general law, to wit, Section 6346-13, General Code, which provides that no wage assignments except those specifically exempted shall be valid. The wage assignments covered by ordinance No. 15776 do not come within the exception of the statute.

There is no municipal purpose served by the check-off of wages of civil service employees. Counsel for appellees argue that a check-off is a convenience to both the municipal appointee and the labor union. We must be realistic and take judicial notice, of what is generally known that the check-off is a means of maintaining membership. Indeed, the record in this case shows that each so-called contract member is required to give a cognovit note

for twenty months due in advance and these proposed check-off payments are to be applied on such notes. The check-off is contrary to the spirit and purpose of the civil service laws of the state.

Section 10 of Article XV of the Constitution of Ohio provides: "Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision."

Under this section of the Constitution and the laws enacted pursuant thereto, labor unions have no function which they may discharge in connection with civil service appointees.

Paragraph 10 of the stipulation on which this case was tried reads:

"A portion of the classified employes of the city of Dayton, Ohio, who are eligible for membership therein, have selected the Dayton Public Service Union, an unincorporated association, as their agent and representative in discussing and adjusting with their employer, the city of Dayton, Ohio, all questions of wages, hours of work and conditions of employment affecting such member employes."

The laws of this state, the regulations of the civil service commissions, state and municipal, and the valid ordinances of the particular municipality cover fully all questions of wages, hours of work and conditions of employment affecting civil service appointees. Municipal civil service appointees are to be appraised and promotions are to be made in individual cases according to merit, fitness and seniority. There is no authority for the delegation either by the municipality or the civil service appointees of any functions to any organization of any kind. Each tub must stand on its bottom. The law provides for the election and appointment of officials whose duties would be interfered with by the intrusion of outside organizations. Nothing said herein is intended to limit free speech but it is intended to limit interference by organization with the duties of the duly elected and appointed officials.

[A portion of the opinion which summarized provisions of the civil service statute is omitted.]

Therefore, we are of the opinion that ordinance No. 15776, together with its supplement, ordinance No. 15937, is invalid, and that the director of finance and city accountant of the city of Dayton has no right or power to check off for the Dayton Public Service Union, and all assignments of wages made for the purpose of such check-off are invalid.

The judgment of the Court of Appeals herein is hereby reversed and final judgment is awarded appellant.

Judgment reversed. . .

ZIMMERMAN and BELL, JJ., concur in the judgment.

SOHNGEN, J., not participating.

ZIMMERMAN, JUDGE (concurring in judgment). . . .

The principal question for decision is whether ordinance No. 15776, passed by the commission of the city of Dayton, is a valid and lawful enactment.

By virtue of Section 3, Article XVIII of the Constitution of Ohio, the city of Dayton possesses the authority to exercise all powers of local self-government and to adopt and enforce within its limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

However, as remarked by Judge Johnson in the case of Fitzgerald et al., Board of Deputy State Supervisors, v. City of Cleveland, 88 Ohio St. 338, 344, 103 N.E. 512, 514, Ann.Cas.1915B, 106, the powers of local self-government thus conferred "are clearly such as involve the exercise of the functions of government." (Emphasis ours.)

Relative to the powers which a municipality may properly exercise, it is stated in 37 American Jurisprudence, 734, Section 119:

"The powers which a municipal corporation may exercise are intended to be used for the advantage of the public and the inhabitants generally and not for the particular advantage of one individual or group of individuals . . . For this reason, any exercise of power must serve a public or municipal purpose in order to be legal."

In the next section of the same volume of American Jurisprudence it is said:

"Generally, a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within the municipal corporation, the sovereign powers of which are used to promote such public purpose. The phrase 'municipal purpose' used in the broader sense is generally accepted as meaning public or governmental purpose as distinguished from private."

See, also, State ex rel. City of Toledo, v. Lynch, Aud., 88 Ohio St. 71, 102 N.E. 670, 48 L.R.A., N.S., 720, Ann. Cas. 1914D, 949.

Consequently, since the ordinance of the city of Dayton under consideration does not accomplish a governmental, public or municipal purpose, but serves merely to promote the private interests of a nonpublic organization, it is ultra vires and invalid.

In other words, the commission of the city of Dayton overstepped its prerogatives by adopting a measure authorizing a governmental department of the municipality to perform extra-governmental services for the benefit of a private enterprise having no connection with the functioning of the city government.

For the reasons and upon the basis stated I concur in the final judgment for the appellant. . . 7

The closed shop calls for but scant notice here. Quite apart from the fact that there has been a strong constitutional and legislative trend away from the closed shop in private employment, there is no reason to suppose that it might gain legal recognition in the public service. The basic difficulty would be that eligibility for public employment would be made to depend upon membership in a private organization. The merit system hurdle, moreover, seems quite insurmountable; the closed shop and civil service are hardly compatible. Petrucci v. Hogan, 27 N.Y.S.2d 718 (Sup.Ct., Spec.Term, Bronx County, 1941).

In private employment collective bargaining as to the terms and conditions of employment is the logical flowering of unionization. Is there at the public level a so-called right to bargain collectively?

MIAMI WATER WORKS LOCAL NO. 654 v. CITY OF MIAMI

Supreme Court of Florida, 1946. 157 Fla. 445, 26 So.2d 194.

SEBRING, JUSTICE. Miami Water Works Local No. 654 is a labor union affiliated with the American Federation of Labor. The membership of the Union is composed of employees of the City of Miami in the Department of Water and Sewers. The Union has instituted suit in the Circuit Court of Dade County, Florida,

⁷ The case is discussed by J. B. Fordham and J. F. Asher, "Home Rule Powers in Theory and Practice" 9 Ohio St.L.J. 18, 41 (1948). The home rule aspects of the case are rather startling. Although, as indicated in the cited article, city civil service regulation had long been considered a home rule power within the grant of all powers of local self-government the opinion assumed that the provisions of the general statute applied and made no reference to the city's home rule charter provisions on civil service. Again, the check-off was classified as a police regulation subject to general law and not as an exercise of a power of local self-government with respect to public employment.

for a declaration of its rights in its relationships with the City. The court below has granted a motion to dismiss the bill of complaint and the plaintiff has appealed from this ruling.

The bill of complaint in the case alleges that for over a period of approximately one year the Union, through its officers and members, has made demands upon the City for recognition as a labor union group invested with authority to bargain collectively with the City through representatives of its own choosing, and to engage in concerted activities for the purpose of such collective bargaining activities or other mutual aid or protection; but that the City officials have refused to deal with the Union, on the ground that to do so would constitute a violation of the City charter. It is further alleged that "members of the plaintiff Union have been coerced and intimidated because of their membership in plaintiff, and have reason to fear that they may be discharged and separated from their employment with the City because of their membership in the Union." It is prayed in the bill that the court find and declare that Chapter 21968, General Laws 1943, F.S.A. § 481.01 et seg., requires the City of Miami to accord to the Union collective bargaining rights in the matter of wages, hours of labor, and conditions of employment with reference to its members: that the court find and declare that under the Constitution of Florida the right of collective bargaining is secured to the Union and that the City is forbidden from discriminating against its members because of membership in the Union; and finally, that an order be entered requiring the City of Miami, through its governmental officials, to accord to the Union and its members the rights, privileges and immunities to which they are entitled under the law.

The charter of the City of Miami contains no provision which even remotely suggests that the duly elected or appointed officials of the City are under an obligation or duty to consult with the plaintiff union, or anyone else, in determining fitness for employment or promotion, or in fixing hours, wages, or conditions of employment of its employees. Indeed, all provisions of the charter are impliedly to the contrary. All employees of the City are under a civil service system established and created by Chapter 19981, Special Acts 1939, as amended by Chapter 21385, Special Acts 1941, Laws of Florida. See sections 60 to 71, inclusive, Charter of the City of Miami, Sp.Acts 1925, c. 10847.

The civil service of Miami is divided into two classes—unclassified and classified service. The unclassified service includes the city manager, his secretary, heads of departments, members of appointive boards, judges of the City court, city clerk, chief of police, and the chief of the fire department. The classified service includes all other employees in the service. The classified serv-

ice is divided into the competitive class, which includes all positions and employments for which it is practicable to determine the merit and fitness of applicants by competitive examinations; the non-competitive class, which consists of employment for all positions requiring peculiar and exceptional qualifications of a scientific, managerial, professional, or educational character; and the labor class, which comprises ordinary unskilled labor. Under a code of rules and regulations required to be promulgated by the civil service board and approved by the City Commission, all employment, appointments and promotions in all positions of the classified service are determined on the basis of merit, efficiency, character and industry. The salaries of the employees in the civil service are required to be fixed by the City Commission and an appropriation made for this purpose after a public hearing. Unless it can be said that Chapter 21968, General Laws of Florida 1943, was intended by the Legislature of Florida to constitute an alteration of the existing City Charter so as to require the City of Miami to recognize the appellant union as an agency with which it must deal or negotiate concerning the matter of its employees, the lawful duty of the City to follow such course against its own wishes does not exist.

Chapter 21968, supra, is a general law regulating the affairs and activities of labor unions and their members in the State of Florida. It contains no reference to the City of Miami, or its employees, or to the special acts of the Legislature by which the City of Miami was created or its charter approved and established. Hence, if Chapter 21968, supra, is to be taken as an amendment to the present Miami Charter it must be held to have become effective for such purpose solely by implication. It is an elementary proposition that amendments by implication are not favored and will not be upheld in doubtful cases. Before the courts may declare that one statute amends or repeals another by implication it must appear that the statute later in point of time was intended as a revision of the subject matter of the former, or that there is such a positive and irreconcilable repugnancy between the law as to indicate clearly that the later statute was intended to prescribe the only rule which should govern the case provided for, and that there is no field in which the provisions of the statute first in point of time can operate lawfully without conflict. See Ferguson v. McDonald, 66 Fla. 494, 63 So. 915: Sanders v. Howell, 73 Fla. 563, 74 So. 802; Town of Hallandale v. Broward County Kennel Club, 152 Fla. 266, 10 So.2d 810.

As has been noted, Chapter 21968, supra, is a general law regulating the affairs and activities of labor unions and their members. Under the act a labor organization is defined as "any organization of employees, local or subdivision thereof having with-

in its membership residents of the State of Florida, whether incorporated or not, organized for the purpose of dealing with employers concerning hours of employment, rate of pay, working conditions or grievances of any kind relating to employment." See Section 2(1). By section 3, Union employees are given "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." The statute impliedly authorizes union employees to stage a strike or walk-out when such action has been agreed to by a majority vote of the employees to be governed thereby; and to picket in the area of the industry within which a labor dispute arises. See Section 9(3, 12).

Chapter 21968, supra, was doubtless intended by the framers to be a complete treatment of the subject matter of labor unions and labor union activities within the State. But we think that a careful consideration of the statute reveals that it was meant to be operative only in the field of private business and industry. It contains no expression of purpose to regulate employment in government. The statute, in its declaration of state policy speaks of the necessity for regulating labor unions as "affecting the economic conditions of the country and the state, entering as they do into practically every business and industrial enterprise See Section 1. The Statute authorizes collective bargaining. It deals with striking and picketing. It prescribes penalties for seizing or occupying property unlawfully during the existence of a labor dispute; of picketing by force and violence, or in such a manner as to prevent ingress and egress to and from any premises; and of picketing beyond the area of the industry within which a labor dispute arises. See Sec. 9(12). These terms are entirely familiar terms in today's pattern of economic and industrial strife in the field of private enterprise, but they are strange and incongruous terms when attempted to be squared with the governmental process as we know it, or when projected into the field of municipal legislation. The City of Miami is a governmental entity created by the state. It derives its powers and jurisdiction from the sovereign authority. It is limited to the exercise of such powers as are expressly granted to it by the state, or as are necessarily and fairly implied in or incident to the powers expressly granted. See Porter v. Vinzant, 49 Fla. 213, 38 So. 607, 111 Am.St.Rep. 93; City of Daytona Beach v. Dygert, 146 Fla. 352, 1 So.2d 170, 133 A.L.R. 1237; State v. Keller, 129 Fla. 276, 176 So. 176. It is a public institution designed to promote the common interests of the inhabitants in their organized capacity as a local government. Its objects are governmental, not commercial. Created for public purposes only, it has none of the peculiar characteristics of a private enterprise maintained for purposes of private gain. Hence it has no "business and industrial enterprise" for its employees to "walkout" of. It has no "area of industry" within which, or without which, picketing may or may not be lawful. It has no authority to enter into negotiations with the labor union, or any other organized group, concerning hours, wages, or conditions of employment, and to make such negotiations the basis for fiscal appropriations. After such appropriations have been made by ordinance the city officials have no authority to deviate from the budget, even though pressure from organized groups may be brought to bear against them. While strikes are recognized by the statute to be lawful under some circumstances, it would seem that a strike against the city would amount, in effect, to a strike against government itself—a situation difficult to reconcile with all notions of government.

The charter of the City of Miami contains a complete plan or scheme for fixing hours, wages, and conditions of employment and for protecting employees from arbitrary discharge from employment. We find no evidence from a study of the general statute involved that the Legislature intended to scrap or junk that plan, or to engraft thereon new rules of action so entirely foreign to the present structure. Had the lawmaking body intended to accomplish such a purpose in a field so important to the State as is the field of municipal legislation there is no reason to believe that it would not have said so in that many words, instead of leaving the matter to sheer speculation and conjecture. We therefore hold that Chapter 21968, General Laws of 1943, did not operate as an amendment, either directly or by implication, of the prior local law establishing the Miami City Charter; and that there is nothing in the present Charter which places upon the City the legal duty to recognize the union for the purposes of collective bargaining.

The appellant next submits that the right of collective bargaining is given the appellant union under Section 12, Declaration of Rights of the Constitution, and that the court should declare that such section is binding upon the municipality. Section 12, so far as pertinent here, reads as follows: "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer." It will be observed that this section of the Constitution does not give the right of collective bargaining to any group. The proviso of the section is merely an expression of the popular will that if the right of col-

lective bargaining is given, an assertion of the rights contained in the main clause of the section shall not operate to deny or abridge the right to bargain collectively. We have seen that Chapter 21968, supra, does not give the union the right to bargain collectively with the City. Neither is the right given by the National Labor Relations Act, as under that statute the United States and all states and political subdivisions thereof are expressly exempted from its operation. See 29 U.S.C.A. § 152, July 5, 1935, c. 372, § 2, 49 Stat. 450. Section 12, Declaration of Rights, therefore, is not applicable under the facts of the case at bar.

It is finally contended that by reason of the protection afforded employees by the terms of Section 12, Declaration of Rights, the City of Miami may not discriminate against employees because of membership in the appellant union. This is not an issue that may be raised in a suit brought by the union. Before a party may secure a declaration of rights under the declaratory judgment statute, F.S.A. § 87.01 et seq., it must appear that the question raised is real and not theoretical, and that the party raising it has a bona fide and direct interest in the result. See Sample v. Ward, 156 Fla. 210, 23 So.2d 81; Ready v. Safeway Rock Co., 157 Fla. 27, 24 So.2d 808. That is not the case here.

Appellant has asked for a declaration of its rights on certain other points which we have not discussed as we deem them outside the scope of the relief to which the appellant is entitled in this litigation.

The decree appealed from should be affirmed.

It is so ordered. . . .

BUFORD, JUSTICE (dissenting). I am unable to concur in the opinion and conclusion reached in the opinion prepared by Mr. JUSTICE SEBRING.

It is my view that in the operation of its waterworks system the City acts in its proprietary or corporate capacity and not in its sovereign governmental capacity; that in the performance of such activity the City is bound by the same laws and burdened with the same duties toward its employes in that activity as may be applicable to any persons or private corporation when engaged in like activity. See Loeb v. City of Jacksonville, 101 Fla. 429, 134 So. 205, 79 A.L.R. 459; Chardkoff v. City of Tampa, 102 Fla. 501, 135 So. 457; Hamler v. City of Jacksonville, 97 Fla. 807, 122 So. 220; City of Lakeland v. Amos, 106 Fla. 873, 143 So. 744 and cases there cited.

I see nothing in the provision of the City Charter applicable here which is in conflict with the provisions of Chapter 21968, General Acts of 1943. There is no reason why the municipal authorities may not bargain with the employees collectively through their duly elected representative just as effectively as they could bargain with each employee separately.

There is no attempt to direct what sort of a contract shall be made or what its terms shall be.

A matter involving the legal principles under consideration here was before the Supreme Court (sic) of Maryland in the case of Mugford et al. v. Mayor and City Council of Baltimore et al., 185 Md. 266, 44 A.2d 745. There the court dealt with these questions at considerable length and reached the conclusion that collective bargaining between a union and a municipality functioning in its proprietary capacity is lawful when the contract resulting from such bargaining is within lawful limits.

It is my view that the allegations presented by the second amended bill of complaint were sufficient to warrant application for declaratory judgment under our holdings in Sample v. Ward, Fla., 23 So.2d 81 and Ready v. Safeway Rock Co., Fla., 24 So.2d 808.

Therefore, the order dismissing the bill should be reversed.

It may be doubted that the Mugford case gives the dissenting opinion of Judge Buford much support. There taxpayers had obtained, in the court below, a decree invalidating a collective labor agreement which had been made between the city and the Municipal Chauffeurs, Helpers and Employees Local Union No. 825, a local unit of the International Brotherhood of Teamsters. Chauffeurs, Warehousemen and Helpers of America, an A. F. of L. affiliate. The defendants did not appeal and, thus, the decree below remained the law of the case as to the validity of the agreement. The only question presented by plaintiff's appeal was the correctness of a clause in the decree excepting voluntary collection and remittance of union dues at the instance of individual employees from a prohibition against payment of union dues by the "check-off" device as stipulated in the contract. The court did contribute a dictum in this much-discussed case, concerning wages, hours and working conditions, which bears quoting.

"To the extent that these matters are covered by the provisions of the City Charter, creating a budgetary system and a civil service, those provisions of law are controlling. To the extent that they are left to the discretion of any City department or agency, the City authorities cannot delegate or abdicate their continuing discretion. Any exercise of such discretion by the establishment of hours, wages or working conditions is at

all times subject to change or revocation in the exercise of the same discretion. But it by no means follows that employees may not designate a representative or spokesman to present grievances."

Sections 921–923 of the Labor Code of California constitute a little NLRA for the state. They do not expressly except governmental units and their employees. In Nutter v. City of Santa Monica, 74 Cal.App.2d 292, 168 P.2d 741 (1946), members and representatives of a local of the Brotherhood of Railroad Trainmen, to which 62 of 63 bus drivers of the City of Santa Monica belonged and which had been designated as collective bargaining agent for the bus drivers, sought a mandatory injunction requiring the city and the members of its governing body to recognize plaintiffs as bargaining agents for the bus operators. The trial court granted an injunction as prayed. Judgment was reversed by the District Court of Appeals, which refused to apply the Labor Code provisions to public employment. The opinion reads, in part (at 168 P.2d 747–748):

"It was argued to the learned trial judge, apparently with success, that the Legislature intended to require the state and municipalities to contract for terms and conditions of employment at least as to matters not covered by the laws of the state or the charters or ordinances of counties and cities. If there is any such undefined territory, the Legislature has made no attempt to identify it, and we cannot. If section 923 should be construed to mean merely that terms and conditions of employment must be fixed by contract in all respects in which they are not fixed by law, it would be illogical and meaningless, for the state and the municipalities would retain the power to cover the entire field of employment by broadening the base of legislation governing the same so as to leave none of the terms and conditions of employment unprovided for. So construed, the legislation manifestly would not affect sovereign powers or interfere with the capacity to perform governmental functions but we cannot subscribe to this construction. An endeavor by the courts to define some limited field for the contract system would be an attempt at judicial legislation. The present system of public employment constitutes the state's policy and should stand, or it is entirely obsolete and wrong, depending upon whether the Labor Code sections were intended to relate only to private industry. If the Legislature intended to make public employment a matter of negotiation and contract, at all, it intended to give preference to the contract procedure over the existing system of laws, charters and ordinances as to all matters usually embraced in labor contracts. If a new policy has been announced to replace the existing one, the functions of government in a broad field which are now exercised by means of legislation, and through delegated authority, would be transferred to agencies which would have the power to bind the state, county and city government by contract. The rules of statutory construction we have stated forbid us to hold that this drastic result has been accomplished by the general phraseology of section 923, or by the failure to specifically except the matter of public employment.

"It is also argued that terms and conditions of employment should be fixed by contract in all activities of the state or municipalities conducted in a proprietary capacity, if not in a governmental capacity. Much has been said in the briefs as to the capacity in which the city operates the bus lines, but that question, we think, is beside the point. If the courts were to say that the legislation relates to public employment in the exercise of proprietary functions, but not governmental functions, that would be judicial legislation. The distinction between employment in one field and the other would be wholly without legislative foundation. If any such distinction is to be drawn it must be by the Legislature. We are not aware of any rule of law which would furnish a basis for applying the provisions of section 923 to one group of public employees to the exclusion of all others."

In a common pleas court decision in Ohio it has been held that Cleveland had neither express nor implied power to make a collective bargaining agreement with a union of street railway employees. City of Cleveland v. Division 268 Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, 30 Ohio Op. 395 (1945); discussed in 44 Mich.L.Rev. 664 (1946).

No court of last resort has, so far as the writer can determine. clearly upheld the authority of a local unit to enter into a collective bargaining agreement. There is, however, a decision of the Supreme Court of Michigan which bears upon the subject. That court has held a state mediation statute, which applied to disputes between employees and employers who were operating public utilities or any other industry affected with a public interest and which provided for mediation during a "cooling-off" period, applicable to employees of a city street lighting department. All of the employees of the department belonged to a union, which they had chosen as their bargaining representative. After negotiations about wages, hours and working conditions broke down the union voted to strike. The union gave due notice under the statute but the state mediation board refused to act since the Attorney General had ruled that it had no jurisdiction over a home rule city. The union and a member who

was among the city employees affected obtained mandamus compelling the board to take jurisdiction. (The City, by intervention, had joined in the unsuccessful opposition to the petition.) The court determined that the mediation act related to a matter of general concern and that the city in operating its lighting system was operating a public utility within the meaning of the act. There was no mention of collective labor agreements but what else could be the object of the mediation procedure, when invoked by a union, but to facilitate collective bargaining resulting in a collective labor agreement? Local Union No. 876, International Brotherhood of Electrical Workers v. State of Michigan Labor Mediation Board (City of Grand Rapids, Intervener), 294 Mich. 629, 293 N.W. 809 (1940). See Mich.Stat.Ann. §§ 17.454 (14), 17.455(2), 17.455(7) (Cum.Supp. 1947).

There are instances of express statutory authorization for collective bargaining by local units with their utility employees. In the state of Washington cities of the first class may engage in collective bargaining with their utility employees with respect to wages, hours and conditions of employment. Wash.Laws of 1935, p. 98, § 1. A recent Ohio statute authorizes collective bargaining with the employees of a publicly owned utility, which, when privately owned, had a contract with a labor union. Authority is granted to make a contract with the same union on the same term or similar terms. 121 Ohio Laws 693 (1945).

The National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, better known as the "Taft-Hartley Act", excludes a state and its political subdivisions from the statutory definition of employer. 29 U.S.C.A. § 152. It is believed that "political subdivision", as used here, covers all general function and special function local units and that the act is inapplicable to employees of local government whether their functions be classified for any purpose as governmental or proprietary. The statutory exemption of the income from bonds of a "political subdivision" from the federal income tax provides a loose analogy. It has been very liberally interpreted. Commissioner of Internal Revenue v. Shamberg's Estate, 144 F.2d 998 (C.C.A.2d, 1944), certiorari denied 323 U.S. 792, 65 S.Ct. 433 (1945).

What sanctions are available to organized public employees?

The writer is not aware of any decision by a court of last resort supporting a right to strike against government. It must be recognized, at the same time, that the labor movement has not been too concerned with the niceties of the law as to either powers or procedure. Presumably there can be changes in the law. In the meantime, organized public employees have not debated such questions as whether a strike against government

at this or that level is legal. Time and again they have made use of the economic sanction of the strike when they considered that their interests, under the circumstances, dictated such a course. The researches of Mr. Ziskind into strikes at all levels of government provided documentation for his book, published in 1940, entitled "One Thousand Strikes of Government Employees." At the present time strikes against local government have become a commonplace. They are not confined to those who work with their hands. Public school teachers in large communities and small have struck for better pay.

Section 305 of the Taft-Hartley Act (29 U.S.C.A. § 188) makes it unlawful for an employee of the Government to participate in any strike. One who violates the ban is subject to discharge and loss of civil service status and is made ineligible for federal reemployment for three years. Some ten state legislatures adopted statutes in 1947 proscribing public employee strikes. The Pennsylvania statute reproduced below (Pa.Act No. 492 of 1947) contains a fairly typical strike ban but does not stop there. Quite significantly, that act sets up a grievance procedure and provides for a hearing in case of discharge. Consider the effectiveness of a drastic strike-ban statute which makes no positive attack upon the causes of employee unrest.

Section 1. As used in this act-

"Public Employe"

(a) The term "public employee" includes all persons holding a position by appointment or employment in the government of the Commonwealth of Pennsylvania, or under any of its agencies, boards, commissions or other branches, or in the government of any political subdivision of the Commonwealth, or any authority, or in the public school system.

"Strike"

(b) The word "strike" means the failure to report for duty, the wilful absence from one's position, the stoppage of work or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment for the purpose of inducing, influencing or coercing a change in the conditions or compensation or the rights, privileges or obligations of employment: Provided, however, That nothing contained in this act shall be construed to limit, impair or affect the right of any public employe to the expression or communication of a view, grievance, complaint or opinion on any matter related to the conditions or compensation of public employment, or the betterment thereof, so long as the same is not designed to and does not interfere with the full, faithful and proper performance of the duties of employment; per to limit impair or affect the

right of any such employe to attend meetings, conferences or hearings, relating to such matters, so long as such attendance is not designed to interfere with the full, faithful and proper performance of the duties of employment for the further purpose of equitably carrying out the provisions of this act. In order to avoid or minimize any possible controversies by making available full and adequate governmental facilities for the adjustment of grievances, the governmental agency involved, at the request of the public employes, shall set up a panel of three members, one to be selected by the employes, one by the governmental agency, and the two so selected to select a third member. The members of the panel shall be compensated for all necessary expenses by the Commonwealth, or the political subdivision thereof, or the authority involved. The panel shall meet within fifteen (15) days. If the grievance can be adjusted through negotiation and informal conferences between the various parties, it shall be so adjusted, if the conference negotiations do not result in rulings satisfactory to all parties concerned, the panel shall afford the public employes and the governmental agency a full hearing after which the panel shall make their findings, copy of which shall be sent to the Governor, to the General Assembly. and to the head of the agency, or political subdivision involved. Upon receipt of the findings of the panel the Governor or the head of the State agency or political subdivision involved may take administrative measures to remedy the complaints. If the Governor or the head of the State agency or political subdivision finds that the situation complained of can only be remedied by legislative action, the Governor may refer the matter to the Legislature for correction, or the head of the State agency or political subdivision may refer the matter to the proper lawmaking body. If the members of the panel decide that legal counsel is necessary they may, with the approval of the Attorney General, engage local counsel to advise them on the questions involved.

Provided, however, that in the case of grievances or controversies involving employes of the public school system of the Commonwealth, the school board or Board of Public Education, at the request of the employes, shall set up a panel of three members, one an employe of the school district to be selected by the employes, one a member of the board of school directors or Board of Public Education to be selected by such body, and the third shall be the State Superintendent of Public Instruction, or his nominee. The members of the panel shall serve without compensation, but shall receive all necessary traveling expenses, which shall be paid by the school district or Board of Public Education involved.

Public Employe May Not Strike

Section 2. No public employe shall strike and no person exercising any authority, supervision or direction over any public employe shall have the power to authorize, approve or consent to a strike by one or more public employes.

Loss of Position

Section 3. Notwithstanding any other provision of law, any public employe who violates the provisions of this act shall thereby abandon and terminate his appointment or employment and shall no longer hold such job or position, or be entitled to any of the rights or emoluments thereof, except if appointed, employed or reemployed as hereinafter provided.

Reappointment or Re-Employment

- Section 4. Notwithstanding any other provision of law, a person violating the provisions of this act may, subsequent to such violation be appointed or reappointed, employed or reemployed as a public employe but only upon the following conditions:
- (a) His compensation shall in no event exceed that received by him immediately prior to the time of such violation,
- (b) The compensation of such person shall not be increased until after the expiration of three years from such appointment or reappointment, employment or re-employment, and
- (c) Such person shall be on probation for a period of five years following such appointment or reappointment, employment or re-employment, during which period he shall serve without tenure and at the pleasure of the appointing officer or body.

Failure to Report for Duty Without Consent

Section 5. Notwithstanding the provisions of any other law, any person holding such a position who, without the lawful approval of his superior, fails to report for duty or otherwise absents himself from his position or abstains, in whole or in part, from the full, faithful and proper performance of his position shall be deemed on strike; Provided, That such person, upon request, shall be entitled to establish that he did not violate the provisions of this act. Such request must be filed in writing within ten days after regular compensation of such employe has ceased. In the case of a public employe who is entitled by law to a hearing upon dismissal or removal, such written request shall be filed with the officer or body having power to remove such employe, and such officer or body shall within ten days conduct a hearing to determine whether the provisions of this act have

been violated by such public employe in the manner provided by law, appropriate to a proceeding to dismiss or remove such public employe. In the case of a public employe who is not entitled by law to a hearing upon dismissal or removal, the request for a hearing shall be filed with the Pennsylvania Labor Relations Board which shall, within ten days, conduct a hearing to determine whether the provisions of this act have been violated by such public employe in the manner provided for hearings before the board by the Pennsylvania Labor Relations Act. All such proceedings shall be undertaken without unnecessary delay.

That a strike-ban statute is not adequate even from the standpoint of technical legal sanctions has been urged upon behalf of the Transit Board of the City of Cleveland, Ohio, which operates the municipal transit system. Early in 1948, officers of the transit workers union physically prevented operation of one-man street cars then in the city's car barns. Their object was twoman operation. The Transit Board sought an injunction. temporary restraining order was issued, pending the hearing. The court of common pleas after hearing on the merits, dismissed the petition on the ground that the Ohio statute banning strikes by public employees provided an adequate remedy at law. On appeal, the court of appeals denied a second temporary restraining order on the ground there had been no further interference with street car operations since the common pleas court had issued the first one. At the time of this writing the case had not been heard on the merits by the Court of Appeals. The case is docketed as City of Cleveland v. Division 268 of the Amalgamated Association of Street, Electrical Railway and Motor Coach Employees. See 81 N.E.2d 310 (1948).

C. RETIREMENT PLANS

Provision for retirement pay for public employees, who have reached the retirement age or are retired for disability, and for benefits to dependents of deceased employees represents, in policy, a recognition of the responsibility of government to "socialize" the economic risks of old age and disability. This is calculated to improve the performance of an employee during his active period by conducing to his peace of mind and concentration on the job. It is a natural concomitant of the merit system and career service. Private business had become aware of its parallel responsibility long before the enactment of the Social Security Act but competitive factors conditioned its attack upon the problem.

Group insurance is not uncommon in public employment. There is authority, moreover, not only that expenditure by a local unit for such insurance is for a public purpose but also that the power may be implied. Bowers v. City of Albuquerque, 27 N.M. 291, 200 Pac. 421 (1921); State ex rel. Thompson v. City of Memphis, 147 Tenn. 658, 251 S.W. 46, 27 A.L.R. 1257 (1923). This type of device serves primarily to protect dependents. The insurance companies do not relish its use to cover the risk of disability.

The Federal Government has not attempted to extend the benefits of the old-age assistance and unemployment provisions of the Social Security Act to the employees of the states and their political subdivisions, even on a voluntary basis. Such employees are expressly excepted from the application of the present legislation. 42 U.S.C.A. § 409(b) (7) (49 Stat. 625, as amended): 26 U.S.C.A. § 1426(b) (7) (53 Stat. 177, as amended); 26 U.S.C.A. § 1607(c) (7) (53 Stat. 187, as amended). clusions cover employment by a state and its political subdivisions and wholly-owned instrumentalities as well as instrumentalities not so owned but which are constitutionally immune from the social security taxes. The Railroad Retirement Act of 1937 does apply to the railroad employees of a state or local unit, which operates a railroad other than a street, interurban or suburban electric railroad not a part of a general steam-railroad system of transportation. 50 Stat. 307, 45 U.S.C.A. § 228a.

It has remained for the states to provide for retirement plans covering employees of their local units. Separate retirement systems for school teachers, policemen and firemen are common but a plan may, of course, embrace employees generally, North Carolina, where both types exist, the statutes have been interpreted to permit a city policeman to belong to either but not to both. Gardner v. Board of Trustees of North Carolina Local Governmental Employees' Retirement System, 226 N.C. 465, 38 S.E.2d 314 (1946). Some plans are voluntary, some compulsory in the sense that an employee must participate and contribute to the retirement fund by salary deduction. There is wide diversity in the quality of financial planning behind retirement plans. Some are crude schemes designed to assure the retired individual or the dependents of a deceased employee some income without any real attack upon the financial problem. Others are projected carefully on an actuarial basis.

Numerous attacks have been made upon retirement plans on constitutional grounds with little success. Retirement plan statutes have been assailed as class legislation, as special laws, as provisions for gifts for private purposes, as measures granting additional compensation for services previously performed. The

gratuity objection has been rejected even where the plan called for immediate benefits to employees who had not and would not contribute to the retirement fund and would not perform services after the plan took effect. Ayers v. City of Tacoma, 6 Wash.2d 545, 108 P.2d 348 (1940). See also State ex rel. Bise v. Knox County, 154 Tenn. 483, 290 S.W. 405 (1926) (The act upheld in this case not only extended pension benefits to persons who had already served the qualifying period but was confined to school teachers in a single county). Would not, however, such retroactive application of a pension or retirement plan constitute extra compensation within the meaning of a constitutional ban upon the making of extra compensation after services have been rendered?

In Burns v. City of St. Paul, 210 Minn. 217, 297 N.W. 638 (1941), an act which required retirement of policemen and firemen at age 65 in cities of the first class contained an exception permitting one whose pension rights had not matured to continue in service, subject to civil service rules and regulations, until they did. This was upheld against attack by employees who had to retire at 65.

Lower Colorado River Authority v. Chemical Bank and Trust Co., 185 S.W.2d 461 (Tex.Civ.App.1945), was a declaratory judgment proceeding in which the Authority sought, as against the trustees under the indenture securing a large revenue bond issue of the Authority, a declaration of, among other things, the legality of a retirement plan for officers and employees financed by increasing their pay four per centum and setting the increase aside for the purpose. The court upheld the plan. The pertinent portions of the opinion follow:

The third contention is that the Board of Directors of the LCRA has no statutory authority to establish a pension plan for its officers and employees, and no lawful authority to pay the expenses of same out of the Revenue Fund created by the Trust Indenture. This on the grounds that under the rule applicable to municipal corporations generally, in the absence of express authority to provide such pension system, the LCRA has power to do only what is 'indispensable for the discharge of its duties and the purposes of its corporate existence' (Foster v. City of Waco, 113 Tex. 352, 255 S.W. 1104; 30 Tex.Jur., Sec. 46. p. 97; idem, Sec. 50, p. 108; 37 Am.Jur., Sec. 112, p. 722); that absent express power, the doctrine of 'Expressio unius exclusio alterius' applies (Red River Nat. Bank v. Ferguson, 109 Tex. 287, 206 S.W. 923; 39 Tex.Jur., Sec. 100, p. 190); that if there be any doubt as to the existence of the power it will be resolved against the Authority (Foster v. City of Waco, supra; Texas-Louisiana Power Co. v. Farmersville, Tex.Com.App., 67 S.W.2d 235); and

that the rule of strict construction applies. 30 Tex.Jur., Sec. 52, p. 110, and cases cited. Such latter rule applies, however, only to the grant of the power in question. If the power exist, and the mode of its exercise is not limited by the Legislature, a generous measure of its exercise will be permitted. West v. City of Waco, 116 Tex. 472, 294 S.W. 832; 37 Am.Jur., Sec. 113, p. 726.

"The LCRA is 'a governmental agency and body politic and corporate' under and by virtue of the law creating it. Lower Colorado River Authority v. McCraw, 125 Tex. 268, 83 S.W.2d 629, 630. In addition the rights and powers granted by general laws to districts created under Art. XVI. Sec. 59a of the Constitution of Texas, Vernon's Ann.St., and without limitation thereon, the Act provides that the powers, rights, privileges and functions of the District shall be exercised by its Board of Directors, who have the powers, among other things, to construct, extend, maintain, use and operate 'any and all facilities of any kind necessary or convenient to the exercise of such powers, rights, privileges and functions': 'to make by-laws for the management and regulation of its affairs': 'to appoint officers, agents and employees, to prescribe their duties and to fix their compensation': 'to make contracts and to execute instruments necessary or convenient to the exercise of the powers, rights, privileges and functions conferred': 'to do any and all other acts or things necessary or convenient to the exercise of the powers' etc.. conferred by the Act: to determine how the moneys of the Authority shall be disbursed; and to fix rates so as to 'pay all expenses necessary to the operation and maintenance of the properties and facilities' of the Authority. And Sec. 18 of said Act provides that 'This Act and all of the terms and provisions hereof shall be liberally construed to effectuate the purposes set forth herein.'

"The Trust Indenture also provides for costs of operation of the Authority's properties; and that the Board in appointing officers and employees and prescribing their duties shall 'fix their compensation in an amount sufficient to obtain the services of competent and efficient persons in such positions.'

"In accordance with the opinion of the General Manager of the Authority, based upon years of experience in such field, that a retirement plan for the benefit of employees would result in less employment turnover, better service from employees, and less ultimate cost to the Authority; the Board, by resolution, authorized a 4% increase in pay, to be set aside, together with contributions from the officers and employees for that purpose, to provide a pension or retirement plan.

"So far as a strict construction of the provisions of the Act creating the Authority, and the powers therein conferred upon the Authority, is concerned, the express language of the Act itself is to the contrary. Not only is that true but both under the terms of the Act and of the Trust Indenture, the appointment and payment of the officers and employees are matters vested in the sound discretion of the Board of Directors and chargeable as costs of operation. While designated and classified as a governmental agency and body politic and corporate, the Authority's functions and activities partake in large measure the nature and characteristics within the legislative restrictions, of a large industrial enterprise, rather than of a strictly governmental function. It has no power to levy taxes, enact laws nor ordinances, as a city has: and its efficient functioning depends in large measure on the sound judgment and good business management of its Board of Directors. They have large control over the operation of its properties, and the income to be derived therefrom, which constitute the only source of revenue to meet its obligations. Of necessity matters relating thereto must be left in large measure to their judgment, experience and discretion; and obviously could not be prescribed in detail by law.

"It is not contended that the Board did not have the authority, in their discretion, to increase the pay of its employees 4% and pay all of such increase direct to said employees. The power to adjust such payments is clearly given; and the question here presented is, we think, merely one of the proper exercise of a power given, as to which liberal rules of construction apply. Any action or plan, relating wholly to payment of employees as part of the cost of operation of the Authority, based upon experience and sound business judgment, and absent any fraud or abuse of discretion, which will contribute to a more efficient and economic operation of the Authority's facilities and properties, would clearly, we think, be authorized as an operating expense and payable out of the Revenue Fund. Retirement pay from funds accumulated through the co-operative efforts of employer and employee are now well-established business practices among practically all large industrial enterprises; and are being increasingly applied by national, state and municipal governments. Typical instances are civil service employees, postal employees, fire and police employees, etc. Such payments do not constitute gratuities, but are grounded on mutual benefits, conducive to continuity of tenure, increased efficiency through continuing employment, loyalty of employees, security of jobs and fidelity to duty. They afford not only an incentive to the employee to retain his job but in the end result in economy to the employer. Upon the same considerations group insurance, hospitalization for employees, etc., payable out of public funds have been sustained. Byrd v. City of Dallas, 118 Tex. 28, 6 S.W.2d 738; Boseman v.

Connecticut Gen. Life Ins. Co., 301 U.S. 196, 57 S.Ct. 686, 81 L.Ed. 1036, 110 A.L.R. 732; State v. City of Memphis, 147 Tenn. 658, 251 S.W. 46, 27 A.L.R. 1257; Nohl v. Board of Education, 27 N.M. 232, 199 P. 373, 16 A.L.R. 1085.

"No question of bad faith nor abuse of discretion by the Board is presented. The matter of payment of officers and employees was one vested entirely in the discretion of the Board. The issue presented is but a modification, in effect, of the method of payment, which, in the opinion of the Board would lessen employee turnover, obtain more efficient service, and lessen ultimate costs of operation, a matter they were not only given authority to determine, but which it was their duty to determine." Affirmed, Lower Colorado River Authority v. Chemical Bank & Trust Co., 144 Tex. 326, 190 S.W.2d 48 (1945).

Much of the litigation concerning local government employee retirement plans has turned on the security of the employee's interest against changes in his status and in a plan. This has led to a deal of debate and rationalization as to the nature of an em-The problem has been formalized in terms ployee's interest. of whether he is thought to have interests which are strictly statutory, on the one hand, or a proprietary or contractual interest, on the other. The problem is one of statutory interpretation to be approached with more sensitivity to legislative objectives as they appear on a whole view of the enabling statute than to formalistic labels. Such particular features as voluntary participation in a plan and a privilege reserved to the individual to withdraw and recoup his contributions bear on the problem. Factually, the following situations may be suggestive: (1) The employee has as yet made no contributions to the fund. has made contributions but no event, upon the happening of which he will qualify for retirement payments, has happened. (3) A qualifying event has happened but the first periodic payment date, under the plan, has not arrived. (4) A qualifying event has happened and a particular payment is past due.

In some cases the position of the employee has been fortified by the "contingency" theory, the gist of which is that, while an employee has only an expectancy entirely dependent upon statute until the event upon which benefits are to be paid happens, the happening of the event ripens the expectancy into a vested right. See Pennie v. Reis, 132 U.S. 464, 10 S.Ct. 149 (1889) (lump sum pension); I Dillon, Mun.Corps. § 431 (5th ed. 1911). In a case decided early in 1937, the Supreme Court of Texas upheld a statutory reduction of future installments of retirement pay as applied to a policeman whose retirement "rights" had already accrued. City of Dallas v. Trammel, 129 Tex. 150, 101 S.W.2d 1009, 99 A.L.R. 997 (1937). The statute read:

"Retirement pensions.—Whenever any member of said departments who shall have contributed a portion of his salary, as provided herein, shall have served twenty (20) years or more in either of said departments, he may be entitled to be retired from said service upon application, and shall, if the board approves, be entitled to be paid from such funds a monthly pension of one-half of the salary received by him at the time of his retirement." That court would apply the contingency theory, at most, no further than to cover a particular installment already due.

Later in 1937 the Supreme Court of the United States decided:

DODGE v. BOARD OF EDUCATION OF CHICAGO

Supreme Court of the United States, 1937. 302 U.S. 74, 58 S.Ct. 98.

Mr. Justice Roberts delivered the opinion of the Court.

The appellants challenge an act of Illinois which they assert impairs the obligation of contracts in contravention of article 1, § 10, of the Constitution of the United States, and deprives them of a vested right without due process contrary to the Fourteenth Amendment. The statute decreased the amounts of annuity payments to retired teachers in the public schools of Chicago.8

Since 1895, the state has had legislation creating a teachers' pension and retirement fund, originally the fruit of teachers' contributions and gifts or legacies, but later augmented by allotments from interest received and from taxes. With this fund and the benefit payments thereunder we are not concerned.

Prior to 1917, teachers in the Chicago schools were employed for such terms as the Board of Education might fix.⁹ In that year an act was passed providing for a probationary period of three years and prohibiting removal thereafter except for cause.¹⁰

In 1926 an act, known as the Miller Law,¹¹ became effective. This provided for compulsory retirement and for the payment of annuities to retired teachers. By section 1 the Board of Education was directed to retire teachers from active service on February 1 and August 1 of each year according to the following

^{*[}Footnotes renumbered.] The act embraces teachers, principals, district superintendents, and assistant superintendents, and retired members of those classes are among the appellants. For the sake of brevity all will be denominated teachers (Smith-Hurd Ill.Stats. c. 122, § 614a et seq.)

⁹ Act of June 12, 1909, § 133, Laws of 1909, p. 380 (Smith-Hurd Ill.Stats. c. 122, § 157 note).

¹⁰ Act of April 20, 1917, §§ 138 and 161, Laws of 1917, pp. 730, 731 (Smith-Hurd Ill.Stats. c. 122, §§ 161 and 186 and note).

¹¹ Smith-Hurd Ill.Stats. c. 122, § 614a et seq. Cahill's Ill.Rev.Stats.1927, c. 122, par. 269(1) et seq.

program: In 1926, those 75 years of age or over; in 1927, those 74 years of age or over; in 1928, those 73 years of age or over; in 1929, those 72 years of age or over; and in 1930, and in each year thereafter, those 70 years of age or over. Section 2 (Smith-Hurd Ill.Stats. c. 122, § 614b) provided: "Each person so retired from active service who served in the public schools of such city for twenty or more years prior to such retirement, shall be paid the sum of fifteen hundred dollars (\$1,500.00) annually and for life from the date of such retirement from the money derived from the general tax levy for educational purposes."

There were two provisos; the one requiring that the annuitant should be subject to call by the superintendent of schools for consultation and advisory service, and the other declaring that the annuity granted by the act was not to be in lieu of, but in addition to, the retirement allowance payable under existing legislation.

In 1927, a third section was added ¹² permitting teachers who had served for 25 years or more, and were 65 years of age or over, who had not reached the age of compulsory retirement, to be retired upon request and to be paid from \$1,000 to \$1,500 per annum, depending upon age at retirement.

The appellants fall into three classes: Those who were compulsorily retired under the Miller Law; those who voluntarily retired under the law as amended; and those eligible for voluntary retirement who had signified their election to retire prior to July, 1935.

July 12, 1935, a further amendment of the Miller Law was adopted ¹³ requiring the board presently to retire teachers then in service who were 65 years of age or over, and in the future to retire teachers as they attained that age. Each person so retired was to be paid \$500 annually for life from the date of retirement. The provisions that such teachers should hold themselves available for advisory service and consultation and that the annuity payments should be in addition to those made to retired teachers pursuant to other legislation were retained. Section 3 of the Miller Law, permitting voluntary retirement between the ages of 65 and 70, was repealed. As construed by the state Supreme Court, the new law reduced to \$500 the annuities of teachers theretofore retired, or eligible for retirement under the Miller Law, as well as those to be retired subsequent to its enactment.

¹² Act of June 24, 1927, Laws of 1927, p. 792, Smith-Hurd Ill.Stats. c. 122, § 614c, and note, Cahill's Ill.Rev.Stats.1927, c. 122, par. 269(3).

¹³ Act of July 12, 1935, Laws of 1935, p. 1378, Smith-Hurd Ill.Stats.1935, c. 122, §§ 614a-614c.

Some of the appellants filed a class bill, in which the others intervened as coplaintiffs, alleging that their rights to annuities were vested rights of which they could not be deprived; that the Miller Law constituted an offer which each of them had accepted by remaining in service until compulsory retirement or by retiring; that the obligation of the contract had thus been perfected and its attempted impairment by the later enactment was ineffective; and praying that the board be commanded to rescind action taken pursuant to the Act of 1935, and enjoined from complying with its provisions. The appellee Board of Education filed an answer in which it denied the existence of a contract and asserted that the payments to be made to appellants were pensions, subject to revocation or alteration at the will of the Legislature. The appellee city of Chicago filed a motion to dismiss for want of equity. After a hearing, at which testimony was taken on behalf of the appellants, the trial court dismissed the bill.

The Supreme Court of the state affirmed, holding that, notwithstanding the payments under the Miller Law are denominated annuities, they cannot be differentiated from similar payments directed by law to be made to other retired civil servants of the state and her municipalities, and are in fact pensions or gratuities involving no agreement of the parties and subject to modification or abolition at the pleasure of the Legislature.¹⁴

The parties agree that a state may enter into contracts with citizens, the obligation of which the Legislature cannot impair by subsequent enactment. They agree that legislation which merely declares a state policy, and directs a subordinate body to carry it into effect, is subject to revision or repeal in the discretion of the Legislature. The point of controversy is as to the category into which the Miller Law falls.

In determining whether a law tenders a contract to a citizen, it is of first importance to examine the language of the statute. If it provides for the execution of a written contract on behalf of the state, the case for an obligation binding upon the state is clear.¹⁵ Equally clear is the case where a statute confirms a settlement of disputed rights and defines its terms.¹⁶ On the other hand, an act merely fixing salaries of officers creates no contract in their favor, and the compensation named may be altered at the will of the Legislature.¹⁷ This is true also of an act

^{14 364} III. 547, 5 N.E.2d 84.

¹⁵ Hall v. Wisconsin, 103 U.S. 5, 26 L.Ed. 302.

¹⁶ New Jersey v. Wilson, 7 Cranch 164, 3 L.Ed. 303; New Jersey v. Yard, 95 U.S. 104, 24 L.Ed. 352.

¹⁷ Butler v. Pennsylvania, 10 How. 402, 13 L.Ed. 472; United States v. Fisher, 109 U.S. 143, 3 S.Ct. 154, 27 L.Ed. 885; Fisk v. Jefferson Police Jury, 116

fixing the term or tenure of a public officer or an employee of a state agency.¹⁸ The presumption is that such a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the Legislature shall ordain otherwise. He who asserts the creation of a contract with the state in such a case has the burden of overcoming the presumption.¹⁹ If, upon a construction of the statute, it is found that the payments are gratuities, involving no agreement of the parties, the grant of them creates no vested right.²⁰

The Supreme Court of Illinois concluded that neither the language of the Miller Law, nor the circumstances of its adoption, evinced an intent on the part of the Legislature to create a binding contract with the teachers of the state. While we are required to reach an independent judgment as to the existence and nature of the alleged contract, we give great weight to the views of the highest court of the state touching these matters.²¹

The Miller Law is entitled, "An Act to provide for the compulsory and voluntary retirement of teachers. the payment of retirement annuities." Smith-Hurd Ill.Stats. c. 122, § 614a, note. The relevant words of section 1 are: "In every city in this State . . . the board of education of such city shall retire from active service . . . all teachers, [of a given age]." Section 2 provides: "Each person so retired shall be paid the sum of fifteen hundred dollars (\$1,500,00) annually and for life from the date of such retirement." Section 3 provides that persons 65 years of age or over "shall upon their own request be retired . . . and thereafter be paid annuities for life." Appellants admit that this is not the normal language of a contract, but rely on the circumstance that they, as teachers, especially those who voluntarily retired when otherwise they would not have been required so to do, rightly understood the state was pledging its faith that it would not recede from the offer held out to them by the statute as an inducement to become teachers and to retire, and that the use of the term "an-

U.S. 131, 133, 6 S.Ct. 329, 29 L.Ed. 587; Robertson, State of Miss., for Use of, v. Miller, 276 U.S. 174, 178, 48 S.Ct. 266, 268, 72 L.Ed. 517.

 ¹⁸ Crenshaw v. United States, 134 U.S. 99, 10 S.Ct. 431, 33 L.Ed. 825; Phelps
 v. Board of Education, 300 U.S. 319, 57 S.Ct. 483, 81 L.Ed. 674.

 ¹⁹ Rector, &c. of Christ Church v. County of Philadelphia, 24 How. 300, 302,
 16 L.Ed. 602; Tucker v. Ferguson, 22 Wall. 527, 575, 22 L.Ed. 805; New Jersey v. Yard, supra; Newton v. Commissioners, 100 U.S. 548, 561, 25 L.Ed. 710; Wisconsin & Michigan Ry. Co. v. Powers, 191 U.S. 379, 387, 24 S.Ct. 107, 48 L.Ed. 229.

²⁰ Pennie v. Reis, 132 U.S. 464, 10 S.Ct. 149, 33 L.Ed. 426; Lynch v. United States, 292 U.S. 571, 577, 54 S.Ct. 840, 842, 78 L.Ed. 1434, and cases cited.

²¹ Larson v. South Dakota, 278 U.S. 429, 433, 49 S.Ct. 196, 197, 73 L.Ed. 441; Phelps v. Board of Education, supra, and cases cited.

nuities" rather than "pensions" was intended as a further assurance of a vested contractual right. The Supreme Court answered this contention by referring to the fact that for years prior to the adoption of the Miller Law, and by a uniform course of decision, it had held that acts indistinguishable from the Miller Law, establishing similar benefit systems, did not create contracts or vested rights, and that the state was free to alter, amend, and repeal such laws, even though the effect of its action was to deprive the pensioner or annuitant, for the future, of benefits then enjoyed. The cases to which the court refers so decide.²² The court further held that the Legislature presumably had the doctrine of these cases in mind when it adopted the act now under review, and that the appellants should have known that no distinction was intended between the rights conferred on them and those adjudicated under like laws with respect to other retired civil servants. We cannot say that this was error.

The appellants urge that the Miller Law, contrary to most of the acts that preceded it, omitted to use the word "pension" and instead used the word "annuity," a choice of terminology based on contract rather than on gift, and implying a consideration received as well as offered. The state Supreme Court (364 Ill. 547, 5 N.E.2d 84, 88) answered the contention by saying: "We are unable to see the distinction. The plan of payment is the same, the purposes are evidently the same, and the use of the term 'annuity' instead of 'pension'—which is but an annuity—does not seem to us to result in the distinction for which counsel for appellants contend."

We are of the same opinion, particularly as an examination of the Illinois statutes indicates that, in acts dealing with the subject, the Legislature has apparently used the terms "pensions," "benefits," and "annuities" interchangeably as having the same connotation.²³

²² Eddy v. Morgan, 216 Ill. 437, 449, 75 N.E. 174; Pecoy v. Chicago, 265 Ill. 78–80, 106 N.E. 435; Beutel v. Foreman, 288 Ill. 106, 123 N.E. 270. The same principles have been consistently announced since 1926. People ex rel. v. Retirement Board, 326 Ill. 579, 158 N.E. 220, 54 A.L.R. 940; People ex rel. v. Hanson, 330 Ill. 79, 161 N.E. 145; McCann v. Retirement Board, 331 Ill. 193, 162 N.E. 859. Appellants urge that the authority of the foregoing cases has been shaken by Porter v. Loehr, 332 Ill. 353, 163 N.E. 689, and DeWolf v. Bowley, 355 Ill. 530, 189 N.E. 893, but these cases did not deal with the question presented in the instant case, and what was said with respect to the nature of pensions was in connection with provisions of the State Constitution.

²³ In acts creating funds through enforced contributions of state and municipal employees, or out of taxes, or both, the titles and the substantive provisions for benefits to retired employees disclose the use of the terms "pensions" and "annuities" interchangeably to describe the payments to be made from the fund. Act of May 24, 1877, Laws, p. 62; Act of May 10, 1879, Laws, p. 72 (Smith-Hurd Ill.Stats. c. 24, § 870 et seq., and notes); Act of May 12, 1905,

The judgment is affirmed²⁴

It is significant that, in 1938, the following section was added to Article V of the Constitution of New York:

"Sec. 7. After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired."

This does not create such a rigid contractual relationship as to prevent reduction in an employee's salary even though his salary serves as the basis for computing his pension rights. Thus, a fireman whose pay has been reduced and whose contributions are correspondingly less, would not be entitled to benefits determined by reference to his former rate of pay. Hoar v. City of Yonkers, 295 N.Y. 274, 67 N.E.2d 157 (1946).

Laws, p. 309 (Smith-Hurd Ill.Stats. c. 81, § 55 et seq. and notes); Act of May 24, 1907, Laws, p. 529; Act of June 14, 1909, Laws, p. 133 (Smith-Hurd Ill. Stats. c. 24, § 892 et seq. and notes); Act of June 27, 1913, Laws, p. 598 (Smith-Hurd Ill.Stats. c. 122, § 560 et seq., and notes); Act of June 29, 1915, Laws p. 465 (Smith-Hurd Ill.Stats. c. 67, § 18 et seq. and notes); Act of May 27, 1915, Laws, p. 649 (Smith-Hurd Ill.Stats. c. 122, § 578 et seq. and notes); Act of June 14, 1917, Laws, p. 748 (Smith-Hurd Ill. Stats. c. 122, § 615 et seq., 631 and note, 632 et seq.); Act of July 11, 1919, Laws, p. 700 (Smith-Hurd Ill.Stats. c. 67, § 19 et seq. and notes); Act of July 11, 1919, Laws, p. 743 (Smith-Hurd Ill. Act of June 29, 1921, Laws, p. 203.

²⁴ The case is discussed in 36 Mich.L.Rev. 1188 (1938) and 17 Ore.L.Rev. 248 (1938).

Chapter 5

LAWMAKING BY LOCAL BODIES

SECTION 1. RANGE AND EFFECT OF LOCAL MEASURES

The territorial range of local measures has already been considered in Chapter 2. With respect to subject matter it may be said that the devolution of legislative powers upon general function local units has been quite extensive. In recent years the lawmaking power of counties has been greatly enlarged. In some instances legislative power has been conferred upon ad hoc units. See New Orleans v. Riisse, 164 La. 369, 113 So. 879 (1927) (port commission); State v. Beacham, 125 N.C. 652, 34 S.E. 447 (1889) (board of health). The devolution, in the case of a municipality, commonly embraces grants of police power and some measure of authority over organization and administration, public improvements and finance. There is an important area, which is not included. It must be apparent that local variations in the law governing ordinary civil relations would be well-nigh insupportable. Thus, the states have never been disposed to empower local units to enact legislation in that area. Freund, Legislative Regulation § 7 (1932). It is believed to be the sounder view, moreover, that constitutional home rule powers do not carry that far, although there is authority that a home rule unit can regulate some of its own civil relationships. Raisch v. Myers, 27 Cal.2d 773, 167 P.2d 198 (1946); Evans v. Berry, 262 N.Y. 61, 186 N.E. 203 (1933).

To assert that a municipality or county may not directly enact tort, contract, property or family law, for example, is far from laying it down that local lawmaking does not affect civil relations. Local traffic and safety measures may be important factors in tort cases. The tort law of different jurisdictions gives them varying effect. A parking meter ordinance obviously affects the property interests of the owners of abutting property. A zoning ordinance controls the use to which property may be put and that, of course, conditions transactions between persons with respect to such property. These are but random examples. It will be seen that, in a broad sense, local measures, like much state regulatory and penal law, do bear strongly on ordinary civil relationships and the effect may be the same as if the local enactment was a positive formulation of civil law.

A local measure, whether it be termed a by-law, in keeping with ancient English practice, an ordinance, or what not, if duly enacted and within the devolution of power to the enacting body,

is "law" with like effect as a statute, in the sense that it governs relations and conduct within its sweep. Whether an ordinance, for example, would be law in the sense of a given constitutional or statutory provision or private instrument or contract is another matter, which will depend upon the language used and the nature and purpose of the provision to be interpreted. Thus, the phrase "statute of any state" as used in Section 237a of the Judicial Code (28 U.S.C.A. § 244) which provides an appeal as of right to the Supreme Court of the United States in a case where a "statute of any state" has been unsuccessfully attacked on federal grounds, in a state court of last resort, is deemed to include municipal ordinances. Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669 (1943); King v. City Council of Augusta, 277 U.S. 100, 48 S.Ct. 489 (1928). On the other hand, Section 266 of the Judicial Code (28 U.S.C.A. § 380), which ordains the threejudge court procedure in cases where interlocutory injunctions are sought, on constitutional grounds, to restrain the enforcement of state statutes, is considered inapplicable to municipal ordinances and even to state statutes which are local in character. Rorick v. Board of Com'rs of Everglades Drainage District, 307 U.S. 208, 59 S.Ct. 808 (1939); Ex Parte Collins, 277 U.S. 565, 48 S.Ct. 585 (1928).

SECTION 2. LEGISLATIVE ORGANIZATION AND PROCEDURE

Except for the New England towns and for the initiative and referendum local lawmaking is a function of local select or representative bodies. The New England towns preserve their ancient practice of town meeting government; legislating is done in town meeting. In populous towns this may, of practical necessity, mean a modified or limited town meeting. The representative bodies of American counties vary widely in structure and procedure but it can be said that they are conventionally single-chamber bodies. While unicameral municipal councils strongly predominate quite a number of our cities still have bicameral governing bodies. The City of Richmond, Virginia had, until the adoption of its new charter in 1948, been a conspicuous example. The trend away from two chambers has been accentuated by the popularity of the council-manager plan.

There is a considerable body of common law governing the organization and procedure of local legislative bodies which must be taken into account where the coverage of statutes is not complete. The character and extent of legislative regulation of the subject varies from state to state. It may be helpful, how-

ever, to set out illustrative provisions from a single jurisdiction as a frame of reference for discussion.

The provisions of the Kentucky Revised Statutes and of the Model City Charter, which follow, are suggestive both of technical points and policy problems.

Kentucky Revised Statutes (1942)

- 85–040 Legislative branch; common council. (1) The legislative power of each city of the third class not having the commission or city manager form of government shall be vested in a board of councilmen, which shall be known as the "Common Council."
- (2) The common council shall have twelve members, elected by the voters of the city at large. The number of councilmen shall be apportioned equally among the wards of the city. Not more than the apportioned number shall be eligible from any ward, and if more candidates reside in any ward than the number of councilmen apportioned to that ward, only the apportioned number of the candidates receiving the highest numbers of votes shall be eligible.
- 85.060. Members of common council; terms; qualifications; compensation. (1) Members of the common council shall take office on the first Monday in December next after their election, and shall hold office for two years and until their successors are elected and have qualified.
- (2) Each councilman, at the time of his election, shall be a citizen of Kentucky, shall have attained the age of twenty-four years, shall have actually resided within the city limits for two years next preceding his election, and the last year thereof in the ward for which he is chosen, and shall be a freeholder in the city.
- (3) No person shall be eligible to the office of councilman who is, at the time of his election, interested in any contract with the city, or holds any franchise under, or any contract with, the city, or is a collector or keeper of city funds and has not, previous to his election, settled with the city and obtained a quietus.
- (4) Each council may, by a two-thirds vote of all its members, fix the compensation of members of the next common council at not more than three dollars to each member for each regular meeting he attends. The compensation shall be fixed before the election of the new councilmen, and shall not be changed during their term of office.
- (5) No councilman shall be eligible to any other city office during the period for which he was elected.
- 85.070 Eligibility, discipline and expulsion of members; interested member not to vote. (1) The common council shall determine as to the qualifications and election of its members. Cases

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of ineligibility, contested elections and disqualification after election shall be heard and determined by the common council in a manner provided by ordinance, and the result declared by resolution, the yeas and nays to be called and entered upon the journal.

- (2) The common council may punish any member for nonattendance or for any improper conduct, by fine, suspension or expulsion. A vote of two-thirds of all members shall be necessary to expel. The fine, suspension or expulsion shall be fixed and declared by a resolution, which shall have the same force as a judgment, and from which there shall be no appeal. The yeas and nays shall be called, and entered with the resolution on the journal. If the offense is committed in the presence of the common council while it is in session, the resolution may be introduced and voted on at once; otherwise, the resolution shall lie over at least one regular meeting, and the offending member shall be notified ten days in advance of the proposed action.
- (3) Any member who has a private or personal interest in any ordinance, resolution or measure proposed or pending before the common council shall disclose the fact and shall not vote thereon upon pain of expulsion.
- 85.080 Quorum and meetings of common council; manner of voting; committees. (1) Seven members of the common council shall constitute a quorum, but a smaller number may adjourn from time to time, and may compel the attendance of absent members in such manner and under such penalties as are prescribed by ordinance.
- (2) The common council shall hold two regular meetings each month, on such days as are fixed by ordinance. The mayor may, and upon the written request of a majority of the members of the common council shall, call a special meeting of the council. In the call he shall designate the purpose of the special meeting, and no other business shall be considered.
- (3) The common council may determine its own rules of proceeding, not in conflict with law, and shall, by ordinance, determine the number of standing committees and the number of members on each.
- (4) The mayor shall be the presiding officer of the common council. He shall decide all questions of order, and in case of a tie shall cast the deciding vote. During sessions of the common council, he shall have the same power to enforce order and decorum and to punish for contempt that circuit judges have. He may issue subpoenas, writs and compulsory process for the attendance of witnesses and the production of books and papers before the common council or any of its committees, and enforce them by appropriate fines, forfeitures and punishments, to be en-

tered as an order upon the journal of the common council or the minute book of the committee.

- (5) At each regular meeting of the common council the proceedings of the previous regular meeting and of all intervening special meetings, shall be publicly read, corrected, approved, signed by the presiding officer and attested by the clerk.
- (6) The vote on all questions coming before the common council shall be viva voce. In the case of elections by the common council, the roll shall be called, and every member present shall be required to vote unless previously excused by a vote of the common council. In voting on the other questions, the roll shall be called if any member requests it, and the yeas and nays shall be entered upon the journal.

85.090 Process to compel attendance of persons and production of papers. In order to enable the common council fully to investigate charges against its members or other officers, or such other matters as it may have authority to inquire into, the mayor or clerk, upon request, may issue subpoenas, and, by order of the common council, may issue compulsory process to compel the attendance of persons and the production of books and papers before the common council or any of its committees. The common council may enforce obedience to its process by fines and forfeitures, which shall be fixed and declared by resolution and shall have the same force as a judgment. There shall be no appeal from the resolution. The yeas and nays shall be called and entered, with the resolution, upon the journal.

85.100 Journal of the common council. The common council shall cause to be kept a complete and correct journal of its proceedings, and, immediately after the adjournment of each session, may have its proceedings for that session published at least once in one or more newspapers published in the city. The newspaper or newspapers shall be selected annually by the common council.

- 85.110 Ordinances, how passed; veto; publication; compilation; recording. (1) No ordinance shall take effect until it has been twice publicly read and passed by the common council at two sessions, held on different days, a majority of those present voting for it on each passage, and the yeas and nays being called and entered upon the journal.
- (2) All ordinances requiring the improvements of streets or alleys or the construction of sewers, or fixing salaries, or prescribing penalties, or fixing the rate of taxation or the amount of licenses, or appropriating more than one hundred dollars shall, in addition to the requirements of subsection (1) of this section, receive on each passage the votes of two-thirds of the members of the common council, the yeas and nays being called and entered upon the journal.

- (3) Every ordinance, resolution, order or measure appropriating or involving the expenditure of money, and every grant of any license, privilege or franchise shall, within three days after its final passage, be correctly and legibly engrossed by the clerk and presented to the mayor for his approval. If the mayor approves it, he shall sign it; if he does not approve it, he shall return it, with his objections in writing, to the common council at its first regular meeting held not earlier than five days after the ordinance, resolution or measure was presented to the mayor. It shall be immediately reconsidered by the council, and shall not take effect unless again passed, with two-thirds of all the members voting for it, the yeas and nays being called and recorded upon the journal. If the mayor fails to return an ordinance, resolution or measure, it shall be in force from the time he should have returned it.
- (4) All ordinances may be published in the same manner as the journal may be published under KRS 85.100, and proposed ordinances may be so published between their first and second passages, but failure so to publish shall not affect the validity of any ordinance.
- (5) The common council may, at least once in every five years, have all the ordinances of a general nature then in force printed, indexed, bound and published, and the volume so published shall be competent evidence in all courts.
- (6) The city clerk shall record all ordinances in a separate book, kept by him for the purpose, and shall properly index them.

Model City Charter (National Municipal League, Fifth ed. 1941, second printing 1944)

Induction of council into office; meetings of council

Sec. 15. The first meeting of each newly elected council, for induction into office, shall be held at ten o'clock in the morning on the second Monday next following its election, after which the council shall meet regularly at such times as may be prescribed by its rules, but not less frequently than once each month. All meetings of the council shall be open to the public.

Council to be judge of qualifications of its members

Sec. 16. The council shall be the judge of the election and qualifications of its members and for such purpose shall have power to subpoena witnesses and require the production of records, but the decision of the council in any such case shall be subject to review by the courts.

Rules of procedure; journal

Sec. 17. The council shall determine its own rules and order of business. It shall keep a journal of its proceedings and the journal shall be open to public inspection.

Ordinances

Procedure for passage of ordinances: first reading

Sec. 19. Every ordinance shall be introduced in writing in the form in which it is to be finally passed, and after passage on first reading shall be published at least once together with a notice of the time and place when and where it will be given a public hearing and be considered for final passage. The first such publication shall be at least one week prior to the time advertised.

Second reading and public hearing

Sec. 20. At the time and place so advertised, or at any time and place to which such hearing shall from time to time be adjourned, such ordinance shall be read in full and, after such reading, all persons interested shall be given an opportunity to be heard.

Further consideration: final passage

Sec. 21. After such hearing, the council may finally pass such ordinance with or without amendment, except that if it shall make an amendment which constitutes a change of substance, it shall not finally pass the ordinance until it shall have caused the amended sections to be published at least once, together with a notice of the time and place when and where such amended ordinance will be further considered, which publication shall be at least three days prior to the time stated. At the time so advertised or at any time and place to which such meeting shall be adjourned, the amended ordinance shall be read in full and a public hearing thereon shall be held and after such hearing the governing body may finally pass such amended ordinance, or again amend it subject to the same conditions. The second passage of any ordinance pursuant to this charter shall be final and no further passage shall be required.

Publication of ordinances after final passage: permissive referendum

Sec. 22. After final passage every ordinance shall again be published in full and, except as otherwise provided in this charter, shall be subject to permissive referendum as provided in article X of this charter. Every ordinance, unless it shall specify another date, shall become effective at the expiration of twenty

days after such publication following final passage, or, if the ordinance be submitted at a referendum election, then upon a favorable vote of a majority of those voting thereon except as otherwise expressly provided by this charter.

DAVIS v. PENDLETON

Court of Appeals of Kentucky, 1934. 252 Ky. 838, 68 S.W.2d 416.

Opinion of the Court by Judge Perry-Reversing.

This is a contest case involving title to the office of councilman for ward No. 1, precinct No. 34, of the city of Hazard, Perry county, Ky.

Hazard is a city of the fourth class, its municipal legislature being composed of six councilmen, elected by the qualified voters of its six wards for which they respectively stand.

At the general election held on November 7, 1933, the appellant, Joe Davis, and the appellee, Arch Pendleton, were rival candidates for the office of councilman for ward No. 1, precinct No. 34, of Hazard, Ky., for the ensuing term.

The election returns were canvassed by the county board of election commissioners, and it was thereby shown that the appellant had received 39 votes and the appellee 150 votes, and the certificate of election to the office of councilman of ward No. 1, so certifying, was issued by the election commissioners to appellee.

Thereupon this action was instituted by appellant to contest the election, wherein he averred that he had filed his petition nominating him as the candidate for this office upon the Independent ticket and under the device of "his own picture"; that he was the only candidate for councilman for his ward, whose name was legally printed upon the official municipal ballots to be voted for the office of councilman for that ward; that at the said election he received 39 legal votes, which constituted a majority and were, he averred, all the legal votes cast for councilman for ward No. 1; but that, notwithstanding this, the election commissioners had certified that the contestee, Arch Pendleton. had received 150 votes, or a majority of 111 votes, and had issued Pendleton, the appellee, the certificate of election. Further, the appellant charged that the contestee had violated the provisions of the Corrupt Practice Act in the election and specifically set out other grounds which he alleged invalidated the votes cast for appellee.

It appears by the record that the appellee had received the Republican nomination for councilman of this ward, but that he had neglected to file same with the county court clerk in time to allow his name to be printed upon the official ballots as the Republican nominee and candidate at the general election for that office.

Further pleadings made up the issues, when, the cause coming on to be heard, the appellee at the conclusion of contestant's evidence moved that his petition be dismissed and for a judgment awarding him (the contestee) the certificate of election; whereupon the court adjudged that contestant's petition be dismissed and, further, that the appellee, Arch Pendleton, be awarded the certificate of election to the office of city councilman of ward No. 1 of the city of Hazard, as was awarded him by the county board of election commissioners.

From this judgment the appellant prosecutes this appeal, assigning numerous grounds of error, alleged committed by the trial court, for reversal of its judgment. We, however, deem it unnecessary to here consider and dispose of these contentions, as in our opinion the appeal should be dismissed upon the basic ground that the lower court was without jurisdiction to entertain and decide this contest action.

As shown by the record, appellant here sought election to the office of councilman of the city of Hazard, which is by section 2740, Kentucky Statutes, declared to be a municipality of the fourth class. By section 3484 of the charter of cities of the fourth class, it is provided that "the legislative power [of such municipality] shall be vested in a mayor, and not less than six nor more than twelve councilmen, as may be provided by ordinance." Further, by section 3486, Kentucky Statutes, it is provided that "the mayor shall be chairman of the board"; that "a quorum shall consist of a majority of the board or of one-half of the members of the board and the mayor"; that "a quorum is invested with power to act" and "in case of a vacancy in the board by death, resignation or any other cause, such vacancy shall be filled as hereinafter provided"; and that "it [the board] shall judge of the eligibility and election returns of its members. adopt rules for its proceedings and government: three-fourths of the members voting affirmatively may, for any good cause, expel any member."

Further, it is provided in part by section 1596a-5, Kentucky Statutes, that:

"For offices not within such gift they [the county board of election commissioners] shall give duplicate or more written certificates over their signatures of the number of votes given in the county, city, town, district, or precinct, particularizing therein the precinct at which the votes were given, one copy to be retained in the clerk's office, one delivered to the sheriff, and one, in case of municipal or district election, to the common council of said municipality or governing authority of such district."

By this statutory provision, it is apparent that the only duty imposed upon the county board of election commissioners, in cases of municipal offices, is to count the ballots and to certify the vote on the face of the returns to the common council of such municipality. Martin v. Eagle, 236 Ky. 267, 32 S.W.2d 1020; Whitaker v. Reynolds et al., 234 Ky. 127, 27 S.W.2d 672. It is not authorized in such cases to issue the certificate of election, nor has it any right to determine whether or not a name legally appears on the ballots. Cheatham v. Williams, 212 Ky. 73, 278 S.W. 139.

The county board of election commissioners certifies to the board of councilmen the vote received by a candidate for the office of councilman, and the board is given the exclusive authority to adjudge and determine the eligibility and election of said candidate to membership upon the board in case the candidate's election thereto is contested, by section 3486 of the charter of towns of the fourth class which provides that "it [the board] shall judge of the eligibility and election returns of its members." In the case of Stack v. Commonwealth, 118 Ky. 481, 81 S.W. 917, 26 Ky.Law Rep. 343, it was held that the statute did not apply to the board in office at the time the election was held nor did it vest such outgoing board with any power or authority to determine contests as to who had been elected to membership in the board for the succeeding term—that is, that no legislative board in office at the time of the holding of the election had the right to try the title of those elected to positions on the succeeding board. Further has it been held by this court that section 3486 of the Statutes, applicable to cities of the fourth class, as well as the similar provisions of charters of cities of different classes, does not apply or vest such contest jurisdiction in the board, where the contest involves the title of so many members of the board of councilmen or aldermen as leaves its uncontested membership less than is required to make a quorum; in such case, the contest must be instituted in the circuit court. Especially could it not act as judge of the contest where the election of all of its members was involved in contest, as was the situation in the case of Orr, etc., v. Kevil, etc., 124 Ky. 720, 100 S.W. 314, 317, 30 Ky.Law Rep. 761, 946, where all the councilmen. claiming title or election to the offices under certificates of election issued them by the county board of election commissioners. contended that, as such the right was given them by section 3486, supra, to sit in judgment upon the merit of their own title

to election. In answering this contention and denying their possession of such right, the court said:

"It never was the law that one could be a judge of his own case. At common law all such judgments were void, as they must be held under every rational system of judicature or governmental policy. No statute should be construed to mean what would be absurd, and what could be more absurd than the submission to a board of councilmen of the question whether they, or their opponents, had been legally elected?"

The facts found in the instant case, however, do not bring it within any of the exceptions to the statutory provision that the board of councilmen is the exclusive judge of the election of its members, as here no question is presented as to the due and lawful election of the other members of the council or the mayor, there being involved in this contest suit only the title of appellant to membership upon the board. Therefore the provision of section 3486, that if other members of a newly elected board hold uncontested title to the office and comprise a quorum, they are the sole judges of the eligibility and election of its members, is here applicable and controlling. . . .

Therefore, for the reasons stated, we are of the opinion that the judgment should be reversed, with direction to the lower court to dismiss the contestant's petition for lack of jurisdiction.

In Ohio it has been held that while a statutory provision similar to that involved in the principal case made council the exclusive judge of the facts bearing on qualification, whether the fact found constituted a ground for disqualification was a question of law which a court was free to determine in quo warranto. State ex rel. Holbrock v. Egry, 79 Ohio St. 391, 87 N.E. 269 (1909).

It is well-established that the provision of Section 5 of Article I of the Federal Constitution, which makes each house of Congress the judge of the elections, returns and qualification of its members, and like provisions in state constitutions confer exclusive jurisdiction upon the legislative body. Barry v. United States, 279 U.S. 597, 49 S.Ct. 452 (1929). For a collection of state cases see Note 107 A.L.R. 205, 209 (1937). In Tennessee the exclusive jurisdiction theory has been carried to the point of precluding judicial review to determine whether a constitutional ban on dual officeholding had been violated. State ex rel. Ezzell v. Shumate, 172 Tenn. 451, 113 S.W.2d 381 (1938).

When it comes to local legislative bodies, however, the judicial tendency is to reject the exclusive jurisdiction theory unless the pertinent constitutional or statutory provision quite clearly embraces it, as by giving a municipal council "sole" authority to determine the qualifications of members. See cases collected in Note 107 A.L.R. 205, 219 (1937).

A. MEETINGS

A public body must convene in a legal form of meeting before it can do business as such. This elementary proposition is true whether the body, or the constituency represented, enjoys corporate capacity or not. There are doubtless exceptional situations involving ministerial duties or particular administrative responsibilities where action as a body was not intended and will, thus, not be judicially required. II Dillon, Mun.Corps., § 522 (5th ed. 1911). Deliberation and action as a body is clearly indicated, however, where the function is lawmaking. One finds that this simple idea is, in practice, sometimes not perceived, but more often, no doubt, deliberately abused by falsifying the record. Counsel for local government can pretty well veto this sort of thing by insisting upon compliance with the law.

There are regular or stated meetings and there are special meetings. The time of regular meetings is fixed either by law or by the body itself under authority of law. This is, of itself sufficient notice to members and the public unless something more is expressly required. The New England town meeting is exceptional. As required by statute, the inhabitants are notified or warned by an elaborate warrant, which sets out the matters to be considered, whether the meeting be considered regular or special. See Nelson v. Town of Belmont, 274 Mass. 35, 174 N.E. 320 (1931). And publication requirements are strictly applied. Drowne v. Lovering, 93 N.H. 195, 37 A.2d 190 (1944) (warrant for town meeting was posted thirteen days before the meeting. The statute required fourteen. This rendered the meeting invalid). Accord: Pollard v. City of Norwalk, 108 Conn. 145, 142 A, 807 (1928).

At a regular meeting of a representative local legislative body any matter within the competence of the body may be acted upon, in the absence of special statutory requirements.

Unless otherwise provided by law, notice of special meetings is necessary and should be personally served, if practicable, upon every member, a reasonable time beforehand. The giving of notice to a particular member may be excused, if entirely im-

practicable, as where he is out of the state and beyond reach at the time of the call. Burrows v. Keebaugh, 120 Neb. 136, 231 N.W. 751 (1930); Knoxville v. Knoxville Water Co., 107 Tenn. 647, 64 S.W. 1075 (1901). If the manner of service, is regulated by statute, strict compliance is indicated. If all members attend and consent to the transaction of business the giving of notice is effectually waived even though expressly required by statute unless a legislative intent to make the requirement absolute clearly appears. Town of Jonesboro v. Gentry, 165 La. 1003, 116 So. 488 (1928); Knickerbocker v. Redlands High School District, 49 Cal.App.2d 722, 122 P.2d 289 (1942). (The three members of a five-man school board, two positions on which were vacant, effectually waived defect in mandatory notice of special meeting).

The call of a special meeting is commonly a function of the presiding officer but the law may provide that a specified number of members may call or require the call of such a meeting. An acting mayor may be empowered to exercise all the powers of the mayor when the latter is absent but the acting mayor may find that he has been overzealous. In a Rhode Island case it appeared that the acting mayor had kept an eye on the movements of the mayor and called a special meeting one morning just after the mayor left by auto to conduct private business in an adjoining state. There was no indication of any emergency. The meeting was declared illegal. The court refused to apply "absence from the state" in a literal physical sense and, instead, looked to the effect of the mayor's absence upon his capacity to perform the act in question. Galinas v. Fugere, 55 R.I. 225, 180 A. 346 (1935).

Dillon states the common law rule to be that notice of a special meeting must state the purpose if other than routine business is to be conducted. He adds, however, that if all members are present they may, by unanimous consent, transact any business, routine or otherwise. II Dillon, op. cit. supra, § 505. And see Burns v. Stenholm, 310 Mich. 639, 17 N.W.2d 781 (1945), where action on an unspecified matter, over the objection of a member, was invalidated. Where, as is often the case, the statute requires that the notice specify the matters to be acted upon at a special meeting and provides that only subjects so specified may be considered the law sets the pattern. If, in addition, the law requires publication of notice, that is indicative of a design to apprize the public of the meeting and should clinch the point that not even by unanimous consent might failure to list an item of business be obviated.

Unless otherwise provided by statute, either a regular or a special meeting may be adjourned by a quorum to a fixed future

date and any business which could have been conducted at the original session may be transacted at the adjourned meeting. II Dillon, op. cit. supra, § 535. As to a county governing body, organized along judicial lines, see Keeling v. Coker, 294 Ky. 199, 171 S.W.2d 263 (1943).

The place of meeting is not always fixed by statute. If the statute be silent reasonable formal action or practice by the local body is not likely to encounter judicial antipathy. Thus, the council of a Pennsylvania borough legally held an organization meeting at the home of a sick member, in the borough, after the remaining members had gotten nowhere in a deadlocked session. In re Borough Council of Frackville, 308 Pa. 579, 162 A. 835 (1932). A meeting beyond the corporate limits would be more difficult to sustain. The Florida Constitution requires that all county officers shall hold their offices and keep their books and records at the county seats of their respective counties. By statute the governing body of Putnam County was required to meet at the county seat. Certain functions of that body were transferred to a board of bond trustees, which consisted of three members. The chairman lived five miles from the county seat. While he was ill at home a special meeting, attended by one other member, was held there and a refunding bond resolution adopted. The third member refused to attend. In a bond validation proceeding the resolution was declared invalid because the meeting was not held at the county seat. Motes v. Putnam County, 143 Fla. 134, 196 So. 465 (1940).

Is a local governing body continuous in nature for legislative purposes despite a turnover in membership? Under the Kentucky statute quoted above a proposed ordinance must be read and passed by the municipal council at two sessions, held on different days. Suppose a new council takes office after first reading. May it take up there and pass the measure on second read-The answer is "yes". Reuter v. Meachem Contracting Company, 143 Ky. 557, 136 S.W. 1028, Ann.Cas.1912D, 265 (1911). Accord: In re Mayor, etc., of New York, 193 N.Y. 503, 87 N.E. 759 (1908). Less difficulty is presented where the terms of members are staggered, as under a pattern calling for an election annually to fill half the seats. Even the Senate of the United States is made out to be a continuing body on that basis. Mc-Grain v. Daugherty, 273 U.S. 135, 47 S.Ct. 319 (1927). So it was as to a city council in Zeo v. Lester, 241 Mass. 340, 135 N.E. 458 (1922). The analogy to Congress or a state legislature is so highly imperfect, however, that it spells little as to a local body elected and to serve as a unit. A city council, for example, functions on a sustained basis, at frequent regular or special meetings. with respect to both legislative and administrative matters. The

position of the Kentucky court appears, then, to be well supported in reason. It is unfortunate that the court should have used a long quotation from the opinion in McGraw v. Whitson, 69 Iowa 348, 28 N.W. 632 (1886), from which was carefully omitted two separate references to the fact that the Whitson case involved an overlapping-term situation. Perhaps counsel, and not the court, was primarily responsible for this highly questionable action. The case is good material for a casebook on legal ethics.

B. QUORUM

At common law a simple majority of the full membership constituted a quorum of a select local body. There is a dictum in Ross v. Miller, 115 N.J.L. 61, 178 Atl. 771, 772 (1935), that in case of a vacancy a common law quorum consists of a majority of the remaining members. None of the cases cited by the court involved a decision to that effect and it is not believed that the proposition is sustained by authority. See McLean v. City of East St. Louis, 222 Ill. 510, 78 N.E. 815 (1906).

A quorum is not lost by the refusal of members present to participate but suppose certain members leave the meeting and less than a majority remain? If by statute provision is made for process to enforce attendance or to punish a recalcitrant member, obtuseness might be effectually overcome but so long as a member is physically away it is not easy to see how he can properly be considered legally present. Compare Gaskins v. Jones, 198 S. C. 508, 18 S.E.2d 454 (1942) (where certain members left after an all-day deadlock on the election of a county manager).

Departures from the simple-majority quorum are quite commonly effected by statute, sometimes as a general change and again by way of establishing special requirements for special cases. Where the law requires a favorable vote of, say, two-thirds of the membership, on a special type of business the effect is to require more than a common-law quorum.

The rule as to an indefinite body, such as inhabitants assembled in town meeting, is that "If the meeting has been duly called and warned, those who assemble, though less than a majority of the whole, have the power to act for and bind the whole, unless it is otherwise provided by law." II Dillon, op. cit. supra, § 520. See also E. B. and A. C. Whiting Co. v. City of Burlington, 106 Vt. 446, 175 A. 35 (1934).

The decisions are not uniform on the question whether, in the absence of statute, less than a quorum may adjourn a meeting. The affirmative is sustained in City of Rolla v. Schuman, 189 Mo.

App. 252, 175 S.W. 241 (1915). For other cases see 2 McQuillin, op. cit. supra, § 632.

Whether a local official, such as a mayor, who presides over local legislative sessions, is to be counted in determining the presence of a quorum, depends upon the character of his participation in the proceedings. If he is a full-fledged member with full voting privileges the answer is obvious, but it has been held that where a mayor could vote only to break a tie he was not to be counted as a member to make a quorum. McLean v. East St. Louis, supra. But see Griffin v. Messenger, 114 Iowa 99, 86 N.W. 219 (1901).

C. VOTE

A majority of a quorum may act, unless, by statute, a more exacting rule obtains. Questions of interpretation arise where the requisite vote is, for example, "two-thirds of the body". Does this refer to the full membership or to a quorum present? The requisite majority may be that of "all members." Does this refer to the full membership provided by law or all members presently serving? See State ex rel. Peterson, Atty. Gen., v. Hoppe, 194 Minn. 186, 260 N.W. 215 (1935).

In a recent Louisiana case the rule that a majority of a quorum may act was modified by judicial legislation. Louisiana has a law providing tenure for school bus operators. The act permits discharge by a parish school board only for cause after a hearing on written charges but does not regulate board voting. The vote to discharge X was six "for" and five "against" at a meeting attended by eleven of thirteen members. With nothing more to go on than the proposition that the act was to be liberally interpreted in the interests of the bus drivers the state supreme court held that a discharge vote required a majority of the full membership. Miller v. Rapides Parish School Board, 209 La. 877, 25 So.2d 623 (1946).

A minority may try to defeat a measure simply by refusing to vote. The courts are not disposed to let such tactics succeed. The non-voters are unquestionably present for purposes of a quorum and if the affirmative votes cast are a majority of a quorum the silent members should be deemed to have agreed to action without them. If, however, there would not be such a majority without treating their silence as concurrence, then what? Suppose the presiding officer has a casting vote and there is an even division between those for a measure and those not voting. May he treat the obstructers as voting "nay" and break the tie? These questions are discussed in II Dillon, op. cit. supra, § 527.

See also Lawrence County v. Lawrence Fiscal Court, 191 Ky. 45, 229 S.W. 139 (1921).

PEOPLE ex rel. BALLANCE, COUNTY COLLECTOR, v. CHICAGO & E. I. RY. CO.

Supreme Court of Illinois, 1924. 314 Ill. 352, 145 N.E. 716.

Action by the People, on the relation of J. Lem Ballance, County Collector, against the Chicago and Eastern Illinois Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed in part, and reversed in part. . . .

Dunn, J. The county collector of Marion county presented an application to the county court at its June term, 1924, for judgment against real estate in that county which was delinquent for certain taxes levied by the county and by the commissioners of highways of certain towns in the county. The Chicago & Eastern Illinois Railway Company filed objections as to various taxes extended against its property, some of which was sustained, while others were overruled, and judgment was entered against its property for the taxes as to which the objections were not sustained. The railroad company appealed, and the taxes involved in the appeal are the county general tax, the county highway tax, and the road and bridge tax of the towns of Salem, Stevenson and Haines.

The objection to the county tax was that it was not levied by an aye and nay vote. The supervisor's record shows in regard to these taxes that at the September meeting, 1923, of the county board, the finance committee recommended an appropriation and tax levy for the year 1923, consisting of a number of items, amounting to \$96,075, for which amount the committee recommended the levy of a tax of 50 cents on the \$100. The action of the board on that recommendation was shown by the entry after the copy of the report, "On motion the same is approved by the board." The record further shows that the road and bridge committee reported a recommendation that 25 cents be levied on the \$100 assessed valuation of all the property of the county for the purpose of maintaining state aid roads, and the action of the board on this report is shown by the entry:

"Moved and seconded that a 25-cent levy for maintenance of state-aid roads be accepted. Motion carried."

The Legislature amended the act in relation to counties in 1921, so as to provide by section 54 that in counties under township organization, among which Marion county is included, the vote on all propositions to appropriate money from the county treasury

shall be taken by ayes and nays and entered on the record of the meeting. Laws 1921, p. 387. An identical provision in section 45 applied to counties not under township organization, and in People v. Wabash Railway Co., 308 Ill. 604, 140 N.E. 10, it was held that the levy of a county highway tax was an appropriation of money, and that the plain intention of the statute was that no such appropriation should be made, except when authorized by a vote taken by ayes and nays and entered on the record. On the hearing of the objections in this case it was not contended that the supervisor's record sustained the levy, and evidence was introduced to show what occurred at the meeting, for the purpose of amending the record. The county clerk testified that at the September meeting, 1923, resolutions in the matter of the levy of the tax were adopted by a viva voce vote; that there was no roll call: that those who were in favor of adopting the resolutions voted by simply saying "aye," and those opposed voted collectively by saying "no." He testified further that at the time the motion was made for the levy of the tax 23 supervisors were present and 1 was absent. When the motion was put, all present voted aye; none voted nay. On cross-examination, he said he had no record showing the vote; that it was just his remembrance; that the question was put, and they voted collectively, and not separately, and there was no roll call. Thereupon, on motion of the people, the court granted leave to amend the supervisor's record as follows:

"A motion was made and seconded that the resolution of the levy of county tax for the year 1923 be adopted. Twenty-three members were present, and on vote on the said motion all present voted 'aye,' and no one voted 'nay.' The motion was declared adopted."

The power of the court to permit the above amendment is derived from section 191 of the Revenue Act (Smith-Hurd Rev.St. 1923, c. 120, § 179), which provides that in all judicial proceedings for the collection of taxes and special assessments amendments may be made, and any irregularity or informality in any of the proceedings connected with the assessment or levy of such taxes, or any omission or defective act of any officer or officers connected with the assessment or levy of such taxes, may be, in the discretion of the court, corrected, supplied, and made to conform to law by the court, or by the person, in the presence of the court, from whose neglect or default the same was occasioned. The amendment, however, does not meet the objection. It does not show an aye and nay vote, or a roll call, which is necessary to such a vote. It really shows no more than was shown by the record before the amendment. It shows the taking of a viva voce vote, and that the resolution was carried by such vote. It does

not show any compliance or attempt at compliance with the requirement of the statute that there shall be an aye and nay vote and the entry of such vote on the record.

The county, in levying taxes, exercises power delegated to it by the Legislature. It has only such power as the Legislature has given it. It can act only in conformity with the power granted to it by the Legislature. Its power to appropriate money is definitely limited as to the time when, the purposes for which, and the manner in which such appropriation can be made, and it cannot act in disregard of any of the limitations that are imposed for the benefit of the taxpayer. The sessions of the county board are required to be open to the public, and the public have the right to be present, and to know and see what occurs, and the manner in which appropriations are made. These provisions are definitely fixed, so that the taxpayers may know when appropriations are made, and may be present if they desire. The vote is required to be by yeas and nays, so that it may be known how each supervisor voted, and that the taxpayers may be able to place the responsibility for the action of the board.

Section 12 of article 4 of the Constitution of 1870 has a provision similar to that of the section in question here. It is that, "on the final passage of all bills, the vote shall be by yeas and nays, upon each bill separately, and shall be entered upon the journal." In Neiberger v. McCullough, 253 Ill. 312, 97 N.E. 660, it is said in regard to this provision:

"The Constitution of 1818 provided that each house should keep a journal of its proceedings and publish the same, and that the ayes and noes of the members on any question should at the desire of any two of them be entered in the journal. That was a privilege given to members which could have had no object except to fix responsibility for votes. The Constitution of 1848 contained the same provision for the entry of the ayes and noes on any question at the desire of two members, but made it compulsory that on the final passage of all bills the votes should be by ayes and noes and should be entered on the journal. The provision was included in the present Constitution for the same evident purpose of fixing the responsibility of members of the General Assembly and compelling them to go on record when voting for or against bills."

It is manifest that this provision was made to apply to the appropriation of money by the supervisors in every county in the state for the same reason: That the supervisors who vote for the levying of taxes and the appropriation of public funds may be compelled to go on record when doing so and may be held responsible for their acts. It has been held, ever since the adoption of this provision in the Constitution of 1848, that it was es-

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sential to an act's becoming a law that the journal of each house of the Legislature should show that the act was passed by a yea and nay vote entered on the journal, with the names of the persons voting. Spangler v. Jacoby, 14 Ill. 297, 58 Am.Dec. 571; People v. Starne, 35 Ill. 121, 85 Am.Dec. 348; Ryan v. Lynch, 68 Ill. 160; People v. Bowman, 247 Ill. 276, 93 N.E. 244. The case of People v. Wabash Railway Co. supra, applied the same rule to the county boards with reference to this provision as had been previously applied to the Legislature.

The case of Barr v. Village of Auburn, 89 Ill. 361, construed a section of the Cities and Villages Act which provided that:

"The yeas and nays shall be taken upon the passage of all ordinances and on all propositions to create any liability against the city, or for the expenditure or appropriation of its money, and in all other cases at the request of any member, which shall be entered on the journal of its proceedings; and the concurrence of a majority of all the members elected in the city council shall be necessary to the passage of any such ordinance or proposition."

The ordinance in question had been passed and all the journal showed of the manner of its passage was:

"On motion of William Brownell the following ordinance [the one in question] was unanimously adopted."

An objection was made to the ordinance that the journal did not show that the yeas and nays were taken upon its passage, and an entry thereof made in the journal; but the court held that the mandatory portion of the section was that the concurrence of a majority of all the members elected was necessary to the passage of an ordinance, and that the purpose of the requirement that the vote should be entered on the journal was that it might appear thereby whether the ordinance was passed by the majority required by the statute. This was regarded as the essential thing, and it was held that the showing of the journal was sufficient in this regard. It was shown that only one member was absent from the meeting of the board at which the ordinance was unanimously adopted. This case has been followed by others, where the legal passage of municipal ordinances has been involved; but the cases which hold that under the same requirement of a yea and nay vote entered on the journal a failure of the journal to show a yea and nay vote is fatal to the passage of the ordinance have also been followed, and there is no doubt about that rule as applied to the Legislature.

The same rule applies to county boards. People v. Wabash Railway Co. supra. This rule is sustained by the better reason, and we see no reason for overruling the decisions in which it has been adopted and followed. Barr v. Village of Auburn, supra,

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will be overruled. The objection to the county tax and the county highway tax should have been sustained. . . .

Affirmed in part, and reversed in part.

Constitutional provisions governing legislative procedure and the form and style of laws usually appear in the legislative articles of state constitutions and are plainly concerned only with lawmaking at the state level. State v. Monsour, 205 La. 272, 17 So.2d 307 (1944); Howard v. Christmas, 180 Tenn. 519, 176 S.W.2d 821 (1944). In Kentucky a statutory provision that repeal of a repealing law does not revive an original enactment, unless the two repealers were enacted at the same session of the legislature, has been held, apart from the exception, to apply to city ordinances. The result is salutary but the interpretation dubious. City of Owensboro v. Board of Trustees, City of Owensboro Employees Pension Fund, 301 Ky. 113, 190 S.W.2d 1005 (1945).

While the meetings of local legislative bodies are usually of a public character, it is not commonly required by statute that the process of enactment include opportunity to interested persons to be heard. There are exceptional situations. It has become standard practice in zoning to conduct a public-meeting type of hearing prior to enactment of a zoning ordinance. Sections 4 and 5 of the widely-adopted Standard Zoning Act expressly exact such a hearing. Section 178 of the New York Village Law has a hearing requirement concerning zoning like that in Section 4 of the standard act. It has been interpreted to mean that if substantial changes are made in a proposed zoning ordinance after hearing a new hearing must be conducted. Village of Mill Neck v. Nolan, 233 App.Div. 248, 251 N.Y.S. 533 (1931), affirmed 259 N.Y. 596, 182 N.E. 196 (1932). But see City of Corpus Christi v. Jones, 144 S.W.2d 388 (Tex.Civ.App.1940). The dilatory provisions of the Model City Charter for public hearing upon every proposed ordinance, which are quoted above. are interesting but of dubious practicability. They apply broadly to all ordinances and do not permit prompt action in case of an emergency.

In most instances of local lawmaking it is clear that notice and a hearing are not required as a matter of procedural due process of law. The writer would not venture to say that this would be true in all conceivable cases. However labeled, whether "legislative," "administrative" or something else, a legislative form may be employed by a local governing body in a matter where the courts might consider procedure akin to a judicial hearing essential to due process.

It may be commanded by statute that a proposed ordinance be read two or even three times on different days before final passage. Again a requirement that consideration be by sections is not uncommon. These are of scant value so far as the objective of care and thorough deliberation are concerned because they are taken no more seriously than a state legislature takes constitutional reading mandates, but reading on different days does serve as a limited brake upon hasty action. If compliance with such requirements is not specifically required to be entered upon the journal and the journal is silent it will be presumed that the proceedings were regular. In addition to the Deshler case, infra, see Town of Ruston v. Dewey, 142 La. 295, 76 So. 719 (1917).

Where the mayor or other presiding or executive officer has a genuine veto submission of a measure to him is an essential step in the process of enactment. Approval is indicated by signing. The power is usually qualified by provision for enactment over the mayor's veto, as in the Kentucky material set out above. The purpose of signing may be mere authentication. That is clear where the officer directed by law to sign is a recording officer. If the purpose is not clear the only safe course to pursue is to treat it as approval, not authentication, and proceed as under the veto power until an authoritative interpretation has been made. See Sly, Fordham and Shipman, The Codification and Drafting of Ordinances for Small Towns 21–22 (N.Y., Mun.Admin.Serv.1932).

In Henrico County v. City of Richmond, 177 Va. 754, 15 S.E.2d (1941), a portion of the opinion in which is set out in Chapter 3, one ground of attack upon the annexation by the city of outlying territory was that the statutory procedure was not followed in that an amendatory ordinance designed to effect compliance was not actually adopted. As to that the opinion reads (at 15 S.E.2d 313–314):

"The county next contends that the proceeding should be dismissed because, it says, the statutory procedure was not followed in that the ordinances adopted by the city council failed to contain an accurate metes and bounds description of the territory proposed to be annexed, as required by Code, § 2956, as amended.

"The council of the city of Richmond consists of two branches, the common council and the board of aldermen. The annexation ordinances had been referred to a special joint committee from both branches. The committee recommended to the council the

adoption of Ordinance 'A' which provided for the annexation of certain areas in Henrico county, designated in the report as Parcels 'A' through 'F,' both inclusive, which were described by metes and bounds.

"When this report reached the floor of the common council, the journal of that body discloses that:

"'Mr. Griggs moved that said Ordinance "A" be amended so as to include the parcels east of Seventh Street, as shown on map accompanying the report of the City Comptroller of January 20, 1937, as parcels 19, 20, 21 and 22, parcel 23 and parcel 24, inserting in the said ordinance "A" proper metes and bounds descriptions to be prepared by the Director of Public Works, and having the lines of said parcels endorsed on the map attached to the ordinance to conform, said parcels to be shown as Parcel "A" (revised) and parcels "G" and "H." Adopted.

"The said ordinance "A", as amended, was placed on its passage and adopted—by the vote of 19 to 1."

"The effect of the Griggs' amendment was to enlarge Parcel 'A,' as proposed by the special joint committee, and to add Parcels 'G' and 'H' to the territory proposed to be annexed.

"Over the objection of the city, the county offered testimony to show that the metes and bounds description of the territory proposed to be annexed was not physically incorporated into the ordinance until the following day, and after the common council had adjourned; that the ordinance, as amended, was subsequently passed by the board of aldermen but was not returned to the common council for approval after the addition of the metes and bounds description.

"Consequently, the county contends that the common council has never adopted the amended ordinance containing the metes and bounds description of the property proposed to be annexed, required by Code, § 2956, as amended.

"We agree with the holding of the majority of the lower court that the recital, in the journal of the council, that the ordinance 'as amended' was adopted, imported absolute verity and could not be contradicted by the evidence offered by the county.

"In Wise v. Bigger, Clerk, 79 Va. 269, 281, this court held that where the journal of the proceedings of the Senate of Virginia showed that a bill had been passed by an affirmative vote of two-thirds of the senators present, this imported absolute verity and could not be contradicted.

"This is in accord with the weight of authority. 23 R.C.L. Records, § 8, p. 159; Capito v. Topping, 65 W.Va. 587, 64 S.E. 845, 847, 22 L.R.A., N.S., 1089.

"The same principle applies to the records of the legislative branch of municipalities. 23 R.C.L., Records, § 9, pp. 159, 160; 98 A.L.R. p. 1229, note, citing numerous cases.

"Here the journal of the common council shows that the ordinance 'as amended'—that is, after the proper metes and bounds description had been inserted—'was placed on its passage and adopted.'

"Moreover, in our opinion, the incorporation of the parcels to be added by reference to the "map accompanying the report of the City Comptroller of January 20, 1937," whereon they were accurately identified and described, was a substantial and sufficient compliance with the statutory requirement as to the metes and bounds description of the property which the city proposed to annex.

"We think the trial court was right in overruling the county's motion to dismiss the proceeding."

In City of Monticello v. Ragan, 258 Ky. 253, 79 S.W.2d 720 (1935), the petition prayed an injunction against the enforcement of a purported ordinance, which was alleged never to have been presented to or acted upon by the governing body. It was further alleged that the record entries concerning the measure were made by mistake. The petition was upheld on demurrer. It would be intolerable, said the court, if council records were conclusive against fraud or mistake.

VILLAGE OF DESHLER v. SOUTHERN NEBRASKA POWER CO

Supreme Court of Nebraska, 1938. 133 Neb. 778, 277 N.W. 77.

CARTER, JUSTICE. This is a suit in equity to enjoin the defendant company from continuing to occupy the streets and alleys of the village of Deshler with its electric distribution system. The trial court granted a mandatory injunction ordering the defendant to remove all poles, wires, transformers, cross-arms and other equipment in the streets and alleys of the village within 90 days from the date of the decree. From this order, defendant appeals.

The record discloses that in 1912 an application for a franchise permitting the construction and operation of an electric light plant and distribution system was made to the village of Deshler by the Bokenkamp brothers. The franchise was not granted, but the applicants proceeded to construct a plant and distribution sys-

tem notwithstanding. In 1917 or 1918 the partnership was dissolved and a corporation known as the Deshler Light & Power Company succeeded to all the rights in the plant and distribution system formerly held by the partnership. In 1924 the defendant, Southern Nebraska Power Company, purchased the electric plant and distribution system of the Deshler Light & Power Company. On July 1, 1935, a written notice was served on defendant to remove its property from the streets and alleys of the village for the reason that it had no franchise, and, after a refusal to comply, this suit was instituted.

Defendant contends that it has a franchise to carry on its business within the village until the year 1940 by virtue of chapter 35 of the 1915 revised ordinances of the village of Deshler. A brief history of this chapter is necessary to a determination of its validity.

The record discloses that on July 6, 1915, the village board appointed Post & Post, of Columbus, Nebraska, to revise and prepare all village ordinances in printed and indexed form. It further appears that George P. Mann became associated with the firm of Post & Post and actually performed the services with reference to the revision of the village ordinances. On September 7, 1915, the village board considered ordinance No. 49, the same consisting of existing ordinances as revised by George R. Mann. It, however, included chapter 35 which purported to be an ordinance granting a 25-year franchise to the Deshler Light & Power Company. It is conceded that no prior franchise ordinance had ever been passed, but defendant contends that the adoption of ordinance No. 49, purporting to reenact all previous existing ordinances and the franchise ordinance therein shown as chapter 35, constituted a grant of a franchise to the Deshler Light & Power Company.

The record of the proceedings of the village board on September 7, 1915, shows that a motion was made and seconded "that said ordinance No. 49 being an ordinance, revising, classifying and indexing all the ordinances of a general nature be advanced to its first reading and rules suspended." The record further discloses that the rules were suspended and the ordinance placed on second and third reading and a unanimous affirmative vote noted in the minutes. The record does not show that ordinance No. 49, or any part of it, was ever read. No mention is made in the minutes of the grant of a franchise or of the specific provision of the ordinance covering that subject.

The defendant offered the testimony of George R. Mann to the effect that on September 7, 1915, an ordinance designated as chapter 35 of ordinance No. 49 was presented to and adopted by the village board which purported to grant a 25-year franchise to

the Deshler Light & Power Company. The records were searched and no evidence of such an ordinance was found. The defendant offered in evidence a carbon copy of the original ordinance claimed to have been adopted and which had been retained in the files of Mr. Mann. The trial court excluded this evidence and we think properly so. Secondary evidence is admissible in a case such as we have before us where the minutes of the board have been lost or destroyed. We know of no rule, however, that permits secondary evidence to be offered where the board proceedings are complete and plain in their meaning. In other words, secondary evidence is not competent to establish the acts of a legislative body where the minutes are available and the record merely silent as to the acts attempted to be proved. Hull v. City of Humboldt, 107 Neb. 326, 186 N.W. 78. We necessarily conclude that the trial court properly rejected this evidence.

The next question is whether the passage of ordinance No. 49, in the manner in which it was passed, was valid and sufficient to grant a franchise to the Deshler Light & Power Company.

The statute governing the enactment of an ordinance such as we have before us provides that it "shall be fully and distinctly read on three different days, unless three-fourths of the council or trustees shall dispense with the rule; and, in case the above rule shall be suspended, such ordinances, with the yeas and navs called and recorded, shall be read by title one time, when introduced, shall be read by title, a second time after the rule shall have been dispensed with, shall be read at large and then put upon final passage." Comp.St.1929, § 17-520. In the case at bar, the rules were suspended and the yeas and nays taken and noted in the minutes after each "reading." The record does not disclose that the ordinance was ever read. Neither is there any evidence that the ordinance was not read. Under such circumstances, the presumption is that the statute was complied with and that the ordinance was read, as by statute required. Hull v. City of Humboldt, supra. Plaintiff further contends that ordinance No. 49 was not properly published. The applicable statute is in part as follows: "And all ordinances of a general nature shall, before they take effect, be published within one month after they are passed, in some newspaper . . or by publishing the same in book or pamphlet form. . . . When ordinances are printed in book or pamphlet form . . . the same need not be otherwise published." Comp.St.1929, § 17-519. The ordinance in question was printed in pamphlet form, a copy thereof appearing in the record as exhibit No. 14. We necessarily conclude that, under the state of the record, ordinance No. 49 was regularly passed, approved and published.

There is no competent evidence in the record of the passage, approval and publication of an ordinance granting a franchise to the Deshler Light & Power Company prior to the passage of ordinance No. 49. Chapter 35 was therefore in fact a new ordinance adopted by the village when it was passed, approved and published as a part of ordinance No. 49.

The title to ordinance No. 49 is: "An ordinance revising, collecting, classifying, dividing into chapters and sections and reenacting all the ordinances of a general and permanent nature of the village of Deshler, Nebraska, in force and effect at the date of the passage and approval hereof; and providing for the publication and distribution of this revision ordinance."

The governing statute is: "Ordinances shall contain no subject which shall not be clearly expressed in its (their) titles, and no ordinance or section thereof shall be revised or amended unless the new ordinance contain the entire ordinance or section as revised or amended, and the ordinance or section so amended shall be repealed." Comp.St.1929, § 17-520. It seems clear to us that the title to an ordinance revising, classifying and indexing the ordinances of a village in force and effect on the date of its passage is not broad enough to include a new ordinance purporting to grant a 25-year franchise to a private company. The inclusion of chapter 35, the franchise ordinance, in ordinance No. 49 is violative of the mandatory provisions of section 17-520, Comp.St.1929, and therefore of no force and effect.

Defendant contends that the village is estopped to deny the validity of the purported franchise ordinance. The record discloses that defendant has maintained and extended its transmission lines since the publication of ordinance No. 49. In fact, defendant purchased the whole system from the Deshler Light & Power Company since the publication of the invalid franchise ordinance. The evidence shows that defendant has expended a sum in excess of \$20,000 in improving its electric plant and distribution system, exclusive of maintenance costs. Defendant has operated within the village for more than 20 years without objection on the part of the village or any one under the assumption that it had a 25-year franchise. During all of this period the village has stood by and done nothing, permitting the defendant to construct and improve its works and enter into contracts with the public generally, even with the village itself. In a case very similar in principle, the supreme court of Illinois said: "It is insisted by appellant here that the doctrine of estoppel in pais has no application to this case, for the reason that the village authorities are not shown to have done any affirmative act calculated to influence others to act on the faith of said invalid ordinance. Theirs, it is said, is no (sic) mere non-action. The judgment of the circuit court, being rendered on the issues joined without evidence, must rest on the allegations of the answer, not denied by the pleas. But among such allegations is the averment that, after the attempted passage of the disconnecting ordinance, the village board caused it to be published, with its other ordinances, in pamphlet form. Here certainly was an affirmative act. Was it calculated to lead others to act upon the supposition that the ordinance was valid? Our statute provides that when city or village ordinances are printed in book or pamphlet form, purporting to be published by authority of the board of trustees or city council, such book or pamphlet shall be received as evidence of the passage and legal publication of such ordinances as of the dates mentioned in such book or pamphlet, in all courts and places, without further proof. Section 4, art. 5, c. 24, Rev.St. [Smith-Hurd Ill.Stats. c. 24, § 77 and note]. Certainly respondents and all others had a right to act on that which relators had made legal evidence of the passage of the ordinance which they now seek to treat as invalid." People v. Maxon, 139 Ill. 306, 28 N.E. 1074, 1075, 16 L.R.A. 178.

The Nebraska statute is very similar to that in Illinois and provides as follows: "All ordinances shall be passed pursuant to such rules and regulations as the council or board of trustees may provide; and all such ordinances may be proved by the certificate of the clerk, under the seal of the city or village, and when printed or published in book or pamphlet form, and purported to be published by authority of the city or village, shall be read and received in evidence in all courts and places without further proof." Comp.St.1929, § 17-521.

A text-writer states the rule to be as follows: "The doctrine of estoppel has often been applied when the question of the validity of an ordinance has been raised. . . . Thus where the ordinance is published in pamphlet form by public authority with the other ordinances of the municipality, a city cannot question its validity, on the ground that it was not validly adopted. Its publication estops the city from so doing." 2 McQuillin, Municipal Corporations, 2d Ed., § 843.

In the case of State v. Lincoln Street R. Co., 80 Neb. 333, 114 N.W. 422, 14 L.R.A., N.S., 336, this court said: "The courts, in a proper case, will apply the doctrine of laches to a case in which the state is a party plaintiff. The state, like individuals, may be estopped by its acts or laches, and should not be allowed to oust a corporation of its rights and franchises, where for a long series of years it has stood silent and seen the corporation expend large sums in the acquisition of property and improvements made thereon under a claimed right so to do under its charter."

In the case of Omaha & C. B. Street R. Co. v. City of Omaha, 90 Neb. 6, 132 N.W. 731, 733, this court said:

"We are therefore of opinion that the general finding of the district court in favor of the plaintiff and interveners was right, and should be adopted by this court. With this view of the case, we are not required to determine the question of the incidental powers of the street railway company. It is sufficient to say that the company supposed that it had the power under its charter to engage in the business of which the defendants now complain, and the city by its officers and agents assumed that it had such power, and by its acts not only permitted, but induced, the plaintiff to expend large sums of money, acquire valuable property, and enter into contract relations with the interveners and others to carry on that business. It follows that it would now be unjust and inequitable to permit the city to destroy plaintiff's property and business which it has thus fostered and encouraged without compensation, and also deprive the interveners of their contractual rights therein.

"It appears that the injunction by its terms was made perpetual, and if not modified may be at some future time construed so as to forever prevent the city from ousting the plaintiff from its streets and alleys under any circumstances. It seems clear that the operation of the order of injunction should not extend beyond the date of the expiration of the plaintiff's franchise, and that the defendant should only be restrained from interfering with or destroying the plaintiff's conduits, poles, wires, and other property without compensation while the present conditions exist, and until the expiration of the plaintiff's alleged or colorable franchise." (Italics ours.)

In another case involving the same principle, this court said: "The doctrine of estoppel in pais is applicable to municipal corporations, and it is equally true that city councils or public authorities will be estopped or not as justice and right may require. There may be cases where to assert a public right would be an encouragement and promotion of fraud, but where a party acting in good faith under affirmative acts of a city has made such expensive and permanent improvements that it would be highly inequitable and unjust to destroy the rights so acquired, then the doctrine of equitable estoppel will be applied." State v. McIlravy, 105 Neb. 651, 181 N.W. 554, 556.

Under the authorities cited, we conclude that the facts are such that the doctrine of laches applies and that the village of Deshler is estopped to claim the invalidity of the so-called franchise ordinance. The village of Deshler is not entitled to a mandatory injunction under the issues raised in this case prior to the date of the termination of defendant's alleged or colorable franchise. For the reasons stated, the decree of the district court is reversed and the suit dismissed.

Reversed and dismissed.

If publication must be made prior to final passage or before a local measure can take effect that step is a part of the process of enactment. Illustrative publication requirements appear in the Village of Deshler case and the statutory and model charter provisions set out above. In Ohio, as in Nebraska, there is a statute requiring publication of all ordinances of a "general nature." For this purpose it has been determined that an ordinance providing for the making of a contract for garbage collection and disposal by incineration was not of a general nature. Dougherty v. Folk, 70 Ohio App. 304, 46 N.E.2d 307 (1941).

Failure to enter an ordinance in the "ordinance book" as provided by statute does not affect validity. Town of Crowley v. Rucker, 107 La. 213, 31 So. 629 (1902). The same conclusion has been reached where a zoning ordinance was not recorded in the office of the county recorder in accordance with statute. Boardman v. Davis, 231 Iowa 1227, 3 N.W.2d 608 (1942).

D. PROCEDURE OF ENACTMENT—OTHER ASPECTS

(1) Fact Finding

La GUARDIA, Mayor v. SMITH

Court of Appeals of New York, 1942. 288 N.Y. 1, 41 N.E.2d 153.

Lewis, Judge. The respondents are members of a special committee of the Council of the city of New York appointed to investigate the affairs and conduct of the Municipal Civil Service Commission. In the course of committee hearings, the investigation was directed to the personnel at the Information Center and to matters involving the method of selection and the qualifications of certain appointees. The inquiry adduced the fact that prior to the Council's investigation the Mayor had directed a city employee to investigate matters which also related to the personnel at the Information Center and that upon completion of her investigation the employee had made a written report to the Mayor. Thereupon, a subpoena duces tecum was issued by the committee and served upon the Mayor's secretary demanding the production of such report. When compliance with the subpoena was refused and contempt proceedings against the Mayor's secre-

tary were imminent the committee was informed in writing by the corporation counsel that "The Mayor is the person who has the possession, custody and control of such papers." It was in these circumstances, and in a continued effort to secure the written report and related papers which were in the Mayor's possession, that the subpoena duces tecum here in question was served upon the Mayor who promptly applied at Special Term for an order vacating the subpoena. The order of Special Term denying such application has been unanimously affirmed by the Appellate Division. The proceeding is here on appeal by our permission.

Accordingly our inquiry goes to the question whether records in the office of the Mayor of the city of New York, which are concededly pertinent to an official investigation by the Council as to matters relating to the affairs of a city department, are immune from the Council's power of subpoena.

We look first to the city's charter. By section 21 the Council is vested ". . . with the legislative power of the city." By section 43—which bears the caption "Power of Investigation"—the Council is granted "power from time to time to appoint a special committee to investigate any matters relating to the property, affairs or government of the city or of any county within the city. Any such committee shall have power to require the attendance and examine and take the testimony under oath of such persons as it may deem necessary." (Emphasis supplied.)

The power of investigation thus reserved to the Council is broad—indeed, it is broader than the analogous section of the prior charter. L.1901, ch. 466, § 54, Cf. Tanzer "New York City Charter," p. 45. Neither the Mayor, nor any other city officer is beyond the scope of investigation thus authorized unless some statute or some well-defined principle of law accords to the Mayor the immunity which he now asserts.

The Mayor recognizes the broad field of investigation thus opened to the Council by the city's charter. He asserts, however, that section 43 should not be construed so broadly as to destroy what he deems to be the mutual independence of the Mayor and Council. In support of that position the Mayor suggests that rigid independence between the functions of his office and those of the Council is in line with the theory which prompted the framers of the Federal Constitution to treat as separate the three branches of government—executive, legislative and judicial. We are told that the Federal plan, which has as one of its bases the requirement of making the three branches of government coordinate and independent, is also fundamental in the design for the government of cities and affords the only basis for decision in this proceeding.

Upon this subject the Supreme Court of the United States has said: "Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state. . . . 'When we speak,' said Story, 'of a separation of the three great departments of government, and maintain that the separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments: and that such exercise of the whole would subvert the principles of a free Constitution.' Story, Const. 5th ed. 393. Again: 'Indeed, there is not a single constitution of any state in the Union, which does not practically embrace some acknowledgment of the maxim, and at the same time some admixture of powers constituting an exception to it.' [Story, Const. 5th ed.] 395." Dreyer v. People of State of Illinois, 187 U.S. 71, 84, 23 S.Ct. 28, 32, 47 L.Ed. 79; Williams v. Eggleston, 170 U.S. 304, 310, 18 S.Ct. 617, 42 L.Ed. 1047.

As to the pattern of government adopted by the State of New York, it may be said that the design includes by implication the separation of executive, legislative and judicial powers. But when the State in turn made provision for the government of cities—which this court has defined as "political institutions, erected to be employed in the internal government of the state" (City of New York v. Village of Lawrence, 250 N.Y. 429, 437, 165 N.E. 836, 838)—we find many instances, including that of the city of New York, where tripartite, independent branches of government are not prescribed.

The State Constitution provides that "It shall be the duty of the legislature to provide for the organization of cities . . ." Art. IX, § 9. In the charter which the Legislature provided for the city of New York (Laws 1934, Ex.Sess., c. 867, adopted by referendum November 3, 1936, effective January 1, 1938) it did not see fit to set up tripartite, co-ordinate branches of government which are independent of each other. True, it prescribed that the Mayor shall be "the chief executive officer of the city" (Charter, §§ 3, 4, 5) and that the Council is "the local legislative body of the city" (Id. § 21). But the fact that functions are exercised by the Mayor and the Council which are independent of each other is not enough, as we conclude, to entitle the Mayor to

invoke immunities which he now asserts and which are accorded the executive under the Federal plan of government.

Under charter provisions the Mayor, when sitting as a member of the Board of Estimate, shares many executive responsibilities with the Comptroller, the President of the Council and the Presidents of the five boroughs. Ch. 3, §§ 61, 62, 70. As a member of the Board of Estimate he is a member of the Municipal Assembly (Laws 1924, c. 363, § 10, amended Laws 1928, c. 671), and as such may perform certain legislative functions (Charter, § 39). And although no provision is made for a judicial branch of the city's government, the charter contains the anomalous provision that "The mayor is a magistrate." Id. § 6.

It is thus seen that, unlike the office of President under the federal system, the powers of the office of Mayor of the city of New York are not exclusively executive. And unlike the federal system, which recognizes a separation of powers into three independent branches, the chartered plan of government for the city of New York has but two branches—executive and legislative the functions of which, as defined by the Legislature, are not always independent. This comes about, as we have seen, from the fact that a city is not sovereign, as are the federal government and the states. "A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and as such it is subject to the control of the legislature." Williams v. Eggleston, supra, 170 U.S. at page 310, 18 S.Ct. at page 619, 42 L.Ed. 1047. "In the absence of express restrictions placed by the Constitution upon the exercise of its legislative powers, the Legislature may create or destroy, enlarge or restrict, combine or divide, municipal corporations." City of New York v. Village of Lawrence, supra, 250 N.Y. at page 437, 165 N.E. at page 838.

It is for that reason that the theory of co-ordinate, independent branches of government has been generally held to apply to the national system and to the states but not to the government of cities. State ex rel. Wilkinson v. Lane, 181 Ala. 646, 658, 62 So. 31; Uridias v. Morrill, 22 Cal. 473, 478; Kaufman v. City of Tallahassee, 84 Fla. 634, 639, 94 So. 697, 30 A.L.R. 471; Ford v. Mayor & Council of Brunswick, 134 Ga. 820, 68 S.E. 733; Sarlls v. State ex rel. Trimble, 201 Ind. 88, 115, 166 N.E. 270, 67 A.L.R. 718; Eckerson v. City of Des Moines, 137 Iowa 452, 461-466, 115 N.W. 177; Bryan v. Voss, 143 Ky. 422, 427, 136 S.W. 884; State ex rel. Simpson v. City of Mankato, 117 Minn. 458, 467–469, 136 N.W. 264, 41 L.R.A.,N.S., 111; Barnes v. City of Kirksville, 266 Mo. 270, 282, 180 S.W. 545, Ann.Cas.1917C, 1121; City of Greenville v. Pridmore, 86 S.C. 442, 443, 68 S.E. 636, 138 Am.St.Rep.

1058; Walker v. City of Spokane, 62 Wash. 312, 324, 325, 113 P. 775, Ann.Cas.1912C, 994. . . .

In our consideration of the present problem we must assume that the action of the Special Committee of the Council in issuing the subpoena duces tecum now challenged, had a legitimate objective. We have treated the committee's power of inquiry, with process to enforce it, as an essential auxiliary to its legislative function. Wilckens v. Willet, *40 N.Y. 521, 1 Keyes 521, 525; People ex rel. McDonald v. Keeler, 99 N.Y. 463, 481, 482, 487, 2 N.E. 615, 52 Am.Rep. 49; McGrain v. Daugherty, 273 U.S. 135, 174, 47 S.Ct. 319, 71 L.Ed. 580, 50 A.L.R. 1; People ex rel. Karlin v. Culkin, 248 N.Y. 465, 478, 162 N.E. 487, 60 A.L.R. 851; Matter of Joint Legislative Committee to Investigate Educational System of State of New York, 285 N.Y. 1, 8, 32 N.E.2d 769. We cannot say, as does the Mayor, that implicit in those provisions of the charter which prescribe the functions of the Mayor and the Council, is an intention by the Legislature to keep the two in a constant state of isolated independence. The scope of section 43 of the charter, already quoted, is broad. In the absence of some principle of law or some legislative declaration of public policy to the contrary, we regard that section as broad enough to apply to the Mayor of the city. We have seen that the principle of the separation of powers applies only to the sovereign authority not to the government of cities. Accordingly we may not read into section 43 by implication a right of immunity such as the Mayor now asserts.

The order should be affirmed, without costs.1

The president of a gas company, which operated in St. Louis, was subpoenaed to testify before a committee of the board of aldermen, charged with investigating the cost of production of gas. The board wanted to consider the data for use in considering license tax legislation. The witness refused to appear. Whereupon the board directed that a writ of attachment be issued to its sergeant-at-arms commanding him to attach the body of the witness and bring him before the committee to testify. He was arrested under the writ and unsuccessfully sought habeas corpus. The action of the committee and the board was sustained. Ex parte Holman, 197 Mo.App. 70, 191 S.W.2d 1109 (1917); affirmed 195 S.W. 711 (1917). The case is discussed in 1 Minn.L.Rev. 518 (1917); the writer mistakenly took it to be

¹ The dissenting opinion of Chief Judge Lehman, in which Judge Rippey concurred, is omitted.

an instance of punishment for contempt. Actually, of course, it was a case of compelling attendance.

The contempt situation was presented in Whitcomb's Case, 120 Mass. 118 (1876). Whitcomb was sentenced to jail for twelve days by order of the Common Council of Boston for refusal to testify before a committee. The common council has been granted the contempt power by statute. In habeas corpus the statute was declared violative of Article 12 of the Massachusetts Declaration of Rights, which forbids arrest or imprisonment but by the judgment of one's peers or the law of the land. The opinion reads in part:

"At the time of the adoption of the Constitution of the Commonwealth, it was no part of the law of the land that municipal boards or officers should have power to commit or punish for contempts. The second article of amendment of the Constitution, which first conferred upon the General Court 'full power and authority to erect and constitute municipal or city governments in any corporate town or towns in this Commonwealth,' authorized it to grant to the inhabitants thereof such powers, privileges and immunities, 'not repugnant to the Constitution,' as it should deem necessary and expedient for the regulation and government thereof; and provided that all by-laws made by such municipal or city government shall be subject at all times to be annulled by the General Court.'

"The city council is not a legislature. It has no power to make laws, but merely to pass ordinances upon such local matters as the Legislature may commit to its charge, and subject to the paramount control of the Legislature. Neither branch of the city council is a court, or, in accurate use of language, vested with any judicial functions whatever. Nor are its members chosen with any view to their fitness for the exercise of such functions. To allow such a body to punish summarily by imprisonment the refusal to answer any inquiry which the whole body, or one of its committees, may choose to make, would be a most dangerous invasion of the rights and liberties of the citizen.

"The Legislature, in the exercise of the power given it by the Constitution, has vested in the board of aldermen and common council authority to decide upon all questions relative to the qualifications, elections and returns of their respective members, and might authorize—we are not now called upon to decide whether it has authorized—them to expel members for sufficient cause. St.1854, c. 448, § 24. Peabody v. School Committee of Boston, 115 Mass. 383. State v. Jersey City Common Council, 1 Dutcher, 536. The Legislature may also provide for the punishment, upon indictment and trial in the courts of justice, of any person who, being duly summoned, refuses to appear and

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testify before any board or tribunal upon a matter which it is authorized by law to investigate or decide. But the Legislature cannot delegate to or confer upon municipal boards or officers, that are not courts of justice, and whose proceedings are not an exercise of judicial power, the authority to imprison and punish, without right of appeal or trial by jury.

"The result is that so much of the St. of 1863, c. 158, as undertakes to confer such authority upon either branch of a city council, or upon the selectmen of a town, is inoperative and void, because it is a violation of the Constitution of the Commonwealth and contrary to the law of the land."

The contempt power is a drastic adjunct both of the judicial and legislative arms of government. Both it and the power to investigate are ancillary, not primary, powers of government. If they are appropriate and available to more than one of the three great branches the question arises whether separation of powers compels or even supports pigeonholing. See O. C. Herwitz and W. G. Mulligan, Jr., "The Legislative Investigating Committee" 33 Col.L.Rev. 4 (1933). Considerations of necessity sustain the exercise of the contempt power by judicial and legislative authorities at the higher levels quite apart from any express grant in the organic law. Jurney v. McCracken, 294 U.S. 125, 55 S.Ct. 375 (1935) is quite consistent, it is believed, with this necessity theory. It is necessary that a legislative body be able, as in that case, to punish a past contempt which cannot be purged because it involves destruction of the evidence desired, if the power is not to be a toothless juridical hag. One may doubt, however, that, in the case of administrative officers and local governing bodies necessity can be invoked to support an implication of the power. The legislature is capable of determining the need and in a position to impose safeguards calculated to protect the individual against abuse of the power. See State ex rel. Morton v. Meyer, 171 La. 313, 131 So. 31 (1930).

The principal obstacle in the way of an express delegation of the power to administrative officers has been a dictum in Interstate Commerce Commission v. Brimson, 154 U.S. 447, 485, 14 S.Ct. 1125 (1894), that the exercise of the power by a federal administrative authority would deny due process. The Federal Government has adhered faithfully to this pronouncement and never made a delegation putting it to the test. This suggests a parallel difficulty under Fourteenth Amendment due process as to a state grant of the power but the states have not been deterred by it. Delegation of the power to state administrative officers or agencies is a commonplace.

SECTION 3. FORM AND STYLE

It must be apparent that the orderly conduct of public business dictates that public bodies act in a way appropriate to the making of a proper official record. It is not imperative, however, apart from statutory requirement, that local lawmaking take any particular form. Thus, it may be done by ordinance, resolution, motion or order. In Sylvestre v. St. Landry Parish School Board, 164 La. 204, 113 So. 818 (1927), for example, the repeal by simple motion of an ordinance creating a school district was upheld in the absence of statutory regulation of form and method of enactment. Conventionally, however, and particularly in municipalities as distinguished from counties, local measures of the greatest dignity, in point of substance, form and process of enactment, have been cast as ordinances or by-laws. The common designation is "ordinance". While it has no universal characteristics an ordinance may be described, generally, as the nearest approach to the local governmental counterpart of a statute.

What can be done by ordinance could be done by resolution. Positive law may make distinctions as to subject matter, form or process of enactment. Usage, however, has tended to call for an ordinance to articulate policy in a measure of a general nature and for a resolution to deal with transitory matters and administrative details. This distinction is illustrated by the bond ordinances and the bond resolution set out in the bond transcript reproduced in Chapter 8. The resolution spells out details in effectuating the policy determinations expressed in the ordinances.

Since, then, the ordinance form is actually of primary practical importance and since that form is likely to be regulated in one or more respects by law, the remainder of this section will be concerned simply with ordinances.

The formal parts of an ordinance, in their normal sequence, are as follows: (1) title, (2) preamble, (3) ordaining clause and (4) purview. The purview or body embraces not only the "stuff" of the measure but also, as appropriate, a definition section, short title, policy section, administrative provisions, separability clause, temporary provisions, exceptions and saving clause, duration clause, repealing clause and clause of taking effect.

If, as is not uncommon, the form of ordinances is not regulated by law, the greatest informality will not affect validity. Thus, a title would not be necessary, nor even an ordaining clause, for that matter. It is enough that the measure is an intelligible expression of the policy determined and of the im-

plementation provided and that it appears from the ordinance as a whole that it was intended to take effect as such. See Colby v. Medford, 85 Or. 485, 167 P. 487 (1917).

There are several familiar types of statutory provisions governing the form and style of ordinances. They all parallel constitutional provisions relating to statutes and present similar legal questions. There is the anti-logrolling requirement that an ordinance embrace but a single subject which shall be expressed in its title. The precise form of the ordaining clause may be prescribed. In some states one encounters provisions that an amendatory ordinance set out, as amended, the ordinance or section being amended.

A preamble is, of course, not necessary. It serves the function of stating the occasion for the enactment or the object sought to be effected, or both. It may be quite useful where a factual basis for the ordinance should be made out, but a policy section, embraced in the purview, is now favored as a means of rendering a measure more intelligible and more palatable to those to be affected by it and to fortify it against attack in court on substantive grounds.

Skill in drafting comes fully into play in formulating the purview. The draftsman has wide leeway in which to do a good or bad job. He can and should draw on the best thought employed in statutory drafting. There is an immense amount of "model" material available, which, if resorted to with care and imagination, may be very suggestive.

Skill is acquired by doing. Thus, the most valuable exercise is actual drafting. It is suggested that before undertaking such a venture the student read the very helpful discussion in chapters 48 and 49 of Sutherland's Statutory Construction (3rd ed. Horack, 1943). It might also be instructive to examine critically from a drafting standpoint the comprehensive zoning ordinance set out in chapter 6 of this volume.

Codification

While the disorganized condition of statute law in many states is bad enough, the situation as to local ordinances is much worse. In Report No. 95 of the National Institute of Municipal Law Officers, entitled "Codification of Municipal Ordinances" and issued in 1943, we find, at page 3, a good description of the chaos in municipal legislative materials:

"In many cities the only records of ordinances are in the minutes of the city council or some similar record. Work upon codification projects has often revealed that some ordinances are entirely lost while others can only be found by searching library files of newspapers. In most cases no indices are available for these materials and often reliance must be placed upon the memory of a city clerk to locate a desired ordinance. Even when the ordinance is found there is no assurance that it remains unrepealed or unmodified by amendment. Instances have been observed where municipalities have been enforcing regulations which have no discoverable written existence. One such illustration, which is perhaps not unique, is the following:

"'One of the leading merchants was charged with violating an ordinance regulating the use of sidewalk space in front of stores and it was not until the trial that the town attorney learned, under the tutelage of opposing counsel, that this ordinance had been amended to authorize the use which the merchant was charged with.'" 2

Current publication of new ordinances is of some value in informing the bar and the public of the rules of the game but a newspaper file or set of newspaper clippings is hardly a satisfactory tool even for the layman, much less the lawyer, who must be able to lay hand upon an authentic expression of the statute, ordinance, or what not, as amended to date, which governs the legal relations with which he is concerned. Compilation helps but it does nothing more than bring together all ordinances presently in force. It lays the groundwork for the thorough process of revision necessary in the preparation of a well-drawn code.

In addition to systematic, orderly bringing together of the "law" of a municipality or county, there is need for thorough indexing, authoritative publication and continuous revision. That can be achieved in large units by first enacting a code which does the job as to ordinances in effect up to that time and later keeping it up-to-date by relatively frequent periodic revisions. In small units the process of periodic revision might well be slower.

Some cities have attacked the problem of continuous revision by publishing their codes in loose-leaf form. Chicago, Illinois, and Dayton, Ohio, are in this group. This device presents problems of authentication, increases the possibilities of mechanical error, throws a continuing burden on users to insert new sheets and simply sets out the law as changed. Medium and small-sized units might find that a system of issuing a code in permanently bound form and supplementing it from time to time with pocket parts or pamphlet supplements, or a combination of both, would be better suited to their needs. This plan has the important advantage of laying before the reader particular provisions as they read before as well as after amendment.

² Barnet Hodes, "Code Revision: Its Value and Procedure," a mimeographed committee report of the Municipal Law Section of the American Bar Association submitted in 1940.

Interest in codification was greatly stimulated in the years just prior to World War II by the Federal Works Progress Administration (later Works Projects Administration) codification program under which federal financial aid was granted for codification projects. Such attacks on the problem are highly ephemeral in results achieved, however, unless sustained by some process of periodic revision. In states where the ground is not covered enabling legislation removing any doubts as to the authority to spend local funds for the purpose, providing general guidance for the smaller units as to method, authorizing effective methods of publication and making the authorized publications authentic evidence for judicial and other purposes, would be quite worthy of legislative consideration.

Simple compilation does not change existing law. Thus, an ordinance inadvertently omitted is not repealed. Gallaher v. City of Jefferson, 125 Iowa 324, 101 N.W. 124 (1904). A code, however, is an enactment and may have the effect of repealing old or adding new law. Ex parte City of Albany, 213 Ala. 371, 106 So. 200 (1925).

Does an ordinance adopting a code violate a requirement that every ordinance shall relate to but a single subject, which shall be expressed in the title? A negative answer has been given in a leading case involving an act adopting a state code. Central of Georgia Railway Co. v. State, 104 Ga. 831, 31 S.E. 531 (1898).

A general requirement of newspaper publication of all ordinances is a serious financial impediment to codification. In a number of states the problem has been met as to building, plumbing and electrical codes by permitting adoption by reference of bodies of regulations, already existent in book form, and filing a limited number of copies with the municipal or county clerk. There is some authority that, without benefit of such a statute. publication can be dispensed with if the code document is first made a public record of the municipality and then adopted by reference. City of Tucson v. Stewart, 45 Ariz. 36, 40 P.2d 72, 96 A.L.R. 1492 (1935). See City of Hazard v. Collins, 304 Ky. 379, 200 S.W.2d 933 (1947). With respect to a general code of ordinances, statutes in a dozen or more states dispense with the requirement as to newspaper publication. Concerning both types of enactments see "Requirements for Publication of Municipal Ordinances and Adoption of Codes by Reference" (Report No. 141 of the Am. Mun. Ass'n, 1940).

SECTION 4. INITIATIVE AND REFERENDUM

"The Referendum is now so commonly coupled with the Initiative in current thought and expression that we are apt to forget the two things are not necessarily dependent on each other. The Initiative might not go beyond what would in effect be a mass petition to the Legislature. The Referendum has long been used without the popular Initiative, notably in the case of the requirement for the submission of constitutional amendments. In certain aspects the Referendum used by itself is quite a different thing from the Referendum in sequence with the Initiative, and so in regard to these aspects it should be examined separately. (Of course it will be understood that by the Initiative is here meant the proposal of laws, and the petition for the application of the Referendum to a law the Legislature has enacted is not included.)

"The Referendum independent of the Initiative may be applied at the will of the Legislature or a body of petitioners. We may conveniently call these processes the Voluntary and the Optional Referendum." Robert Luce, Legislative Principles, 599 (1930). Mr. Luce's discussion of the merits of the initiative and referendum, beginning at p. 563, is provocative.

At the local as well as the state level legislation by representative assemblies has been the rule and popular legislation the exception. It is safe to say, however, that the use of the initiative and referendum in municipal lawmaking has been far more extensive than in state legislation. It is plain that it would take a constitutional provision to make the initiative and the optional referendum available at the state level. The same would, by the weight of the cases, be true even of the voluntary referendum. In re Opinion of the Justices, 232 Ala. 56, 166 So. 706 (1936); State v. Watkins, 176 La. 837, 147 So. 8 (1933), Note 41 Yale L.J. 132 (1931). No such difficulty confronts us in local government. Delegation of ordinance-making power to the governing bodies of municipalities was customary long before the adoption of the first state constitutions. Whether one takes the doctrine of nondelegability of legislative power as a broad working proposition, which does not preclude limited devolution of lawmaking power, or as a hard-and-fast idea to be applied with ineluctable logic, the result is the same; for, on the one hand, the type of delegation in question could be supported as a limited affair within bounds, and, on the other, we have an historic exception strongly resistant to formal logic.

It can be said that, apart from the New England towns, custom did not generally support delegation of the power to the local

electorate. This point has been met with the contention that, assuming the force of the custom, nothing hinges on whether the delegation is to the local governing body or to the voters. H. L. McBain, "Delegation of Legislative Powers to Cities" 32 Pol.Sc. Quar. 276, 301 (1917).

In no less than twelve states, constitutional provision has been made for the initiative and referendum at the municipal, and in some instances the county, level. W. W. Crouch, "The Initiative and Referendum in Cities" 37 Am.Pol.Sc.Rev. 491 (1943). The Ohio provision reads: "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law." Ohio Const. Art. II, § 1f.

Does such a provision apply to legislative action of the dignity of charter-making? The draftsmen of the Ohio Municipal Home Rule Amendment dealt specifically with charter-making and amendment but included not a word as to the repeal or abolition of a home rule charter. The gap was bridged when the Ohio Supreme Court upheld resort to the initiative as a method of abandoning a charter. Youngstown v. Craver, 127 Ohio St. 195, 187 N.E. 715 (1933).

It would be rather awkward to have a general appropriation ordinance killed by referendum vote. The referendum is, moreover, a relatively slow process. Thus, an exception may be made in favor of appropriation and emergency ordinances. Notwithstanding the broad language of the Ohio constitutional provision it has been decided that the legislature, in prescribing initiative and referendum procedure, may render the referendum unavailable with respect to emergency measures. Shryock v. Zanesville, 92 Ohio St. 375, 110 N.E. 937 (1915). The constitutional provision as to municipalities follows closely on the heels of those governing the state initiative and referendum. The latter except tax laws, statutes making appropriations for current expenses and emergency measures from the referendum. The court read the state and local sections together. It has since been determined that a legislative declaration of emergency is not subject to judicial review. State ex rel. Schorr v. Kennedy, 132 Ohio St. 510. 9 N.E.2d 278 (1937). Presumably, the same would be true of action by a city council.

If an Ohio municipal governing body may repeal an initiated ordinance, there is reason to believe that, by use of an emergency clause, the repeal can be made to stick. In non-charter municipalities the initiative and referendum are governed by general statute. It has been interpreted to leave the local governing body

with power to repeal an initiated ordinance, State ex rel. Singer v. Cartledge, 129 Ohio St. 279, 195 N.E. 237 (1935); as well as an ordinance approved by referendum, Francisco v. Cuyahoga Falls, 19 Ohio L.Abs. 666 (Ohio App.1935). These cases are criticized in 2 Ohio St.L.J. 56 (1935). A municipality is free to regulate the subject by home rule charter. State ex rel. Daniels v. City of Portsmouth, 136 Ohio St. 15, 22 N.E.2d 913 (1939). There is, then, a way to give the voters the last word upon a particular measure. A helpful review of the cases may be found in Luker v. Curtis, 64 Idaho 703, 136 P.2d 978 (1943) (statute repealing an initiated enactment upheld).

Detailed consideration of initiative and referendum procedure will not be undertaken here. The student will, doubtless, wish to study the requirements in his particular jurisdiction. It is true, of course, that a characteristic feature of both devices is the petition of electors, which brings them into play. The petition is jurisdictional. Beyond that it is hazardous to generalize as to what requirements may be deemed mandatory and what directory. A leading case on procedure is Knowlton v. Hezmalhalch, 32 Cal. App.2d 419, 89 P.2d 1109 (1939). Concerning withdrawal of names from a petition see Note 85 A.L.R. 1373 (1933), and State ex rel. Wehr v. Council of City of Bellevue, 138 Ohio St. 93, 32 N.E.2d 839 (1941).

KEIGLEY v. BENCH, City Recorder

Supreme Court of Utah, 1939. 97 Utah 69, 89 P.2d 480, 122 A.L.R. 756.

McDonough, Justice. Plaintiffs are petitioners for a writ of mandamus and a writ of prohibition in aid thereof to compel the defendant to issue "petition copies" of a referendum petition and to do all other ministerial acts provided for by statute, for the purpose of referring to the voters of Provo City an ordinance passed by the Board of Commissioners of said city on the 5th day of August, 1938, making certain changes in an ordinance approved by the voters of Provo City October 13, 1936, at a special election held pursuant to the initiative and referendum statutes of the state, authorizing issuance of bonds to finance the construction of a municipal electric plant and system. The latter ordinance was before this court in Utah Power & Light Co. v. Provo City, 94 Utah 203, 74 P.2d 1191.

Defendant refuses to comply, giving as the reason therefor that the changes made in the ordinance by the commissioners relate to administrative matters within the discretion of the Board of Commissioners as to which there is no right to a referendum. Plaintiffs contend that any ordinance ordained by the governing body of a municipality is subject to referendum under R.S.Utah 1933, 25-10-21, and that the right is not restricted to ordinances legislative in nature but extends as well to such as are administrative and executive in character. They contend further that even though it be held that only legislative ordinances are within the purview of the statute the ordinance in question must be referred on proper demand. . . .

If Section 25-10-21, R.S.U.1933, subjects all ordinances to the referendum, then proper demand for the reference of an ordinance gives rise to the duty of performing the acts specified in the statutes. If it contemplates the reference only of ordinances which are legislative in nature, then if the subject matter of a petition is an administrative act of the commission, he may rightly refuse to perform the duties prescribed by the statute. In such case, his duty to act does not arise since he is asked to refer that which is not subject to referendum. It is admitted that proper steps have been taken by petitioners to entitle them to their writ if the ordinance is such as Section 25-10-21 contemplates.

The original bond ordinance provided for the issuance of bonds to the amount of \$850,000 at $4\frac{1}{2}$ per cent interest, payable from revenue of the electric power system, the construction of which was contemplated, and in amounts specified beginning Oct. 1, 1939, and ending Oct. 1, 1951, interest payments to begin April 1, 1937; and provided for annual allocations to a sinking fund to pay interest and principal. The bonds were to be dated October 1, 1936. Litigation which pended until May, 1938, held up the issuance of the bonds and the commencement of the project. Thereafter, as recited, an ordinance was passed making the changes here questioned.

Four changes were made by the ordinance of August 5, 1938: (1) It provided that the bonds shall be dated the first day of the month in which the issue or any part thereof is delivered to the purchaser, instead of October 1, 1936; (2) The first bonds are made to mature three years after the date of issue, instead of Oct. 1, 1939; (3) The bonds were made payable over a period of twenty years while the original ordinance provided for their payment over a fifteen year period, thus reducing the amount of the annual principal payments and increasing the number thereof from thirteen to eighteen, and provided for corresponding changes in the annual amounts set aside in the sinking fund; (4) It provided for power of call of the bonds by the City of Provo in inverse numerical order on any interest payment date by paying principal and interest due, plus a premium equal to one year's interest.

Has the defendant the right to deny referendum on these changes?

We have definitely intimated that under R.S.Utah 1933, 25-10-21, only ordinances which are legislative in character must be referred. In Keigley et al. v. Bench, 90 Utah 569, 63 P.2d 262, we held that the resolution questioned was legislative in character and therefore subject to referendum, citing McQuillin on Municipal Corporations (2nd Ed.) Sec. 366, p. 407, and 43 C.J. 585, which confine the referendum to legislative acts.

It is pointed out by plaintiffs that in that case the question before the court was whether a resolution legislative in nature was referable and that the question of whether an ordinance administrative in character is likewise subject to referendum is not there decided. They contend that the wording of the statute clearly and specifically confers the power of referendum as to non-legislative ordinances. We do not think so.

Section 25-10-21, R.S.U.1933, is entitled "Direct Legislation in Cities and Towns." It reads: "Subject to the provisions of this chapter, legal voters of any city or town, in such numbers as herein required, may initiate any desired legislation and cause the same to be submitted to the law-making body, or to a vote of the people of such city or town for approval or rejection, or may require any law or ordinance passed by the law-making body of such city or town to be submitted to the voters thereof before such law or ordinance shall take effect."

Plaintiffs take the position that while the portion of the section providing for initiative limits the same to legislation, the words "any law or ordinance" used relative to the referendum comprehends any action of the City Commission embodied in an ordinance. However, such construction overlooks the modifying clause of the sentence wherein such words are used. It does not say baldly that any law or ordinance may be required to be submitted. Nor does it so say relative to any law or ordinance passed by the governing body of a city. It is a law or ordinance passed by "the law making body" of the city with which the section deals. That is, the legislature, contemplating the governing body of a city as having administrative and executive functions as well as those legislative in nature, had in mind such actions of that body as constitute it a "law making", a legislative body. The wording, we think, clearly expresses the intention to limit the referendum to the acts of the governing body performed in the execution of its function as a "law making" body. This construction is clearly indicated by reference to Section 1 of Article 6 of the Constitution of Utah. Article 6 is entitled. "Legislative Department". Prior to 1900 the legislative power was by Section 1 thereof vested in the legislature. Such sec-

tion was amended in that year to vest such power in the legislature and the people, and provided for the initiative and referendum. The paragraph of the section vesting these powers in any legal subdivision of the state uses identical language to that contained in Section 25-10-21, except that the words "legal subdivision" are used where "city or town" are used in the statute. It seems to us clear that the intention evidenced by such amendment was to vest legislative power-and such power onlydirectly in the people, and that the subsequent enactment by the legislature of a statute substantially identical in language leaves little doubt as to its intent. We, therefore, construe the language of such statute to apply only to laws, ordinances, resolutions or motions which are legislative in character. The reader is referred to the following cases which so limit the application of a statute, ordinance, or constitutional provision relative to the initiative and referendum, some of which enactments are not as clear in expression as to the limitation as our own. Murphy v. Gilman, 204 Iowa 58, 214 N.W. 679; Hopping v. Council of Richmond, 170 Cal. 605, 150 P. 977; Dwyer v. City Council of Berkeley, 200 Cal. 505, 253 P. 932, 934; McKevitt v. City of Sacramento, 55 Cal.App. 117, 203 P. 132: Riedman v. Brison, 217 Cal. 383, 18 P.2d 947; Whitbeck v. Funk, 140 Or. 70, 12 P.2d 1019; Monahan v. Funk, 137 Or. 580, 3 P.2d 778; State v. Charles, 136 Kan. 875, 18 P.2d 149; Yarbrough v. Donaldson, 67 Okl. 318, 170 P. 1165; Brazell v. Zeigler, 26 Okl. 826, 110 P. 1052; People v. Kapp, 355 Ill. 596, 604, 189 N.E. 920; Oakman v. City of Eveleth, 163 Minn. 100, 203 N.W. 514; Dooling v. City Council of Fitchburg, 242 Mass. 599, 602, 136 N.E. 616, 617; McQuillin on Municipal Corporations (2nd Ed.) Sec. 366: 43 C.J. 585. The reason for such rule is well stated in the Dooling case, supra: "As a matter of practical administration of municipal affairs this interpretation is the only one which would render the referendum a workable measure. If every dissatisfied bidder or disappointed applicant for municipal work could invoke the machinery of the referendum of the statute. thereby suspending the taking effect of the measure thus assailed, efficiency and economy in the business administration of a city would be seriously affected. This consideration has led courts of some other jurisdictions to go far in restricting municipal referendum to legislative acts."

To hold otherwise would so seriously interfere with municipal government and administration that we could not espouse the view without explicit statutory pronouncement, despite the holdings or intimations of some jurisdictions extending the referendum into actions of an administrative character. State v. City of Bellingham, 183 Wash. 439, 48 P.2d 602; State v. City

of Tacoma, 184 Wash. 160, 49 P.2d 1113, (But see Neils v. City of Seattle, 185 Wash. 269, 53 P.2d 848, 849); Dickson v. Hardy, 177 La. 447, 148 So. 674, 677; State v. Davis, 41 S.D. 327, 170 N.W. 519.

But it remains to decide whether the changes in the bond ordinance constitute legislative changes or are such as the Board of Commissioners, in its administrative capacity, could make. . . .

"The crucial test for determining what is legislative and what is administrative is whether the ordinance is one making a new law, or one executing a law already in existence." Whitbeck v. Funk, supra [140 Or. 70, 12 P.2d 1020]. . . .

It is apparent that here, where we are examining the original ordinance in juxtaposition to that enacted on August 5, 1938, to determine whether the changes made are legislative or administrative, the determinative test is the first. Does the later ordinance make a new law or execute one already in existence? The answer to the question should, we think, be sought by inquiring whether such changes may reasonably be viewed as clearly within the ambit of the voters' intention when the original ordinance was adopted by them. Certain it is that these changes involve such details of the entire scheme as could have been left to the discretion of the Board of Commissioners had provision been made, either by statute or in the ordinance. State v. City of West Palm Beach, 127 Fla. 849, 174 So. 334 (maturity dates); Hogan v. City of Corning, 217 Iowa 504, 250 N.W. 134 (manner of financing and details of construction); Commissioners of Public Works v. Bank of Dorchester, 115 S.C. 183, 105 S.E. 32 (interest rate); Tyson v. Salisbury, 151 N.C. 468, 474, 66 S.E. 532 (date of maturity); Clark v. City of Los Angeles, 160 Cal. 30, 116 P. 722 (date of maturity); Radford v. Heth, 100 Va. 16, 40 S.E. 99 (interest and period for which bonds issued); Village of Bronxville v. Seymour, 122 App. Div. 377, 106 N.Y.S. 834 (interest rate); City of Vernon v. Montgomery, Tex.Civ.App., 265 S.W. 188 (date of maturity). But see Hansard v. Green. 54 Wash. 161, 103 P. 40, 24 L.R.A., N.S., 1273, 132 Am.St.Rep. 1107, and State v. Clausen, 87 Wash. 111, 151 P. 251 (time bonds are to run, rate of interest and manner of payment must all be included).

Here, however, the ordinance submitted included the date of the bonds, their maturity dates with the period for interest and the total time the bonds should run. There is very respectable authority holding that even though a question submitted to the voters includes matters which are superfluous, those matters are binding on the body carrying out the ordinance. Madera Irr. District v. Miller & Lux, 9 Cir., 47 F.2d 61; Mann v. City of Artesia, 42 N.M. 224, 76 P.2d 941, 944; Oklahoma Utilities Co.

v. City of Hominy, 168 Okl. 130, 31 P.2d 932, 935; Percival v. City of Covington, 191 Ky. 337, 342, 230 S.W. 300. In State v. Salt Lake City, 35 Utah 25, 99 P. 255, 18 Ann.Cas. 1130, the superfluous provision was invalid, and in City of Santa Barbara v. Davis, 6 Cal.App. 342, 92 P. 308, the matter covered was reserved to the city by statute and neither case is applicable here in this respect.

We believe, however, the scope of the discretion of such body when acting pursuant to direct legislation is as indicated above. If it is clearly deducible that the variation is pursuant to the intended purpose and policy expressed by the voters then such variation is administrative: if not, then it is to that extent legislative. It seems clear that when it is sought by rule, resolution, or ordinance to vary the terms of a proposition as voted by the electors, there is a right to have the variance referred if it relates to matters which probably influenced the vote of the electors. Percival v. City of Covington, supra, at page 343 of 191 Ky., 230 S.W. 300: Mann v. City of Artesia, supra, at page 944 of 76 P.2d; Skinner v. City of Santa Rosa, 107 Cal. 464, 40 P. 742, 745, 29 L.R.A. 512. We do not think, however, that it would be necessary for us to find that the inclusion of the variance in the proposition submitted to the voters might probably result in a rejection of the proposition itself in order to hold the variance referable. If there is such a material departure from the referred ordinance as to constitute such a policy change as is not within the evident intent of the voters, then such departure cannot be said to be other than legislative. However, it is not unwarranted to assume that a variance, more favorable to the city than the submitted ordinance, is in conformity with such intent and hence that such a change presents no valid grounds for referendum. See Miller v. Town of Bernice, 186 La. 742. 751, 173 So. 192; First National Bank of Laramie v. City of Laramie, 25 Wyo. 267, 168 P. 728, 730; State v. City of West Palm Beach, supra.

Plaintiffs point out the proviso to be inserted in the bonds by virtue of the August 5, 1938, ordinance authorizing Provo City to call any outstanding bonds in inverse numerical order by paying the principal, interest due, and a premium equal to one year's interest. The original ordinance provided that the bonds "shall be in substantially the following form" and then set out the provisions of a proposed bond. This seems to have authorized changes in form which are not substantial. In any case, we think that the provision in question, since it permits the call and refunding of bonds at advantageous interest rates and gives to the City of Provo the option to shorten the period for retirement of the bonds, is one which clearly does not increase the bur-

dens of the city and its adoption constitutes a variation, within the rule stated above, which is administrative and hence not subject to referendum.

Plaintiffs contend they are entitled to referendum because the date of the bonds and the dates of interest and principal payments were advanced. Under the original ordinance the bonds were to be dated October 1, 1936, the first payment of interest was due April 1, 1937 and the first payment of matured bonds on October 1, 1939. Without reference to dates, this provided for payment of interest every six months from the date the bonds were to bear, and for maturity of a specified amount of the bonds annually, beginning three years after the date of approval of the ordinance. The changes as to these payments, made by the August, 1938, ordinance, are that the interest shall be payable every six months after the first day of the month in which the bonds are issued and bonds shall mature annually beginning three years after the first day of the month of issue. Under the provisions of the original ordinance the bid of John Nuveen and Company for the bond issue is accepted. That bid was at the price of par and accrued interest to the date of delivery. The interest and principal of the bonds were made payable out of a special fund to be derived from the operation of the proposed electric power and light system. It seems clear to us that the variations in these respects are definitely pursuant to the legislative intent. They comport with the legislative policy and purpose expressed in the original ordinance. They apply to a scheme of interest and maturity approved by the voters, but without reference to the date of the election. The voters believed they were putting a plan into effect in October, 1936, and that the operation of the system would produce the revenue to pay the interest on and to retire the bonds. Were the bonds to be issued at this time to be dated October 1, 1936, the bidder would be required to pay therefor par plus accrued interest, which accrued interest would be immediately payable to the holder of the bonds.3 But a principal payment would have been due October 1, 1939, payable out of funds to be derived from a system not yet constructed. To say that a change which would make the expressed legislative policies and purposes effective would probably have changed votes favorable to such policies and purposes is unreasonable. We think it clear that this variation was not such as would influence the voters, and assuming no change of sentiment—which we must assume—the vote on

³ This is a misconception. In actual practice coupons past due at the time bonds are issued are detached and canceled before delivery of the bonds. The interest adjustment is confined to the current coupon. [Ed.]

the undated proposal would be the same as on the proposal dated as of the election month.

There is support for this view in decided cases which hold that changing the dates of the bonds without altering the financial scheme is an administrative change which does not conflict with the edict of the voters. State v. Jennings et al., 48 Wis. 549, 553, 4 N.W. 641; City of Oxnard v. Bellah, 21 Cal.App. 33, 130 P. 701, 703; Cook v. City of Louisville, 260 Ky. 474, 477, 86 S.W.2d 157; Yesler v. City of Seattle, 1 Wash. 308, 25 P. 1014, 1019. This change is rather similar to changing the denominations of authorized bonds without affecting the total amount issued or the amount maturing annually, which has been held unobjectionable. Law v. San Francisco, 144 Cal. 384, 77 P. 1014; Derby & Co. v. City of Modesto, 104 Cal. 515, 38 P. 900; City of Santa Barbara v. Davis, 6 Cal.App. 342, 92 P. 308.

Lastly, plaintiffs urge that the change in the financial plan which results in its stretching over twenty years and eighteen annual payments of principal, instead of fifteen years with thirteen annual payments, should be submitted to the electors of Provo City. We find this to be more substantial than the other changes. Defendant argues that this benefits the city by reducing the annual payments and still leaving the city free to call bonds as fast as the city is able to retire them. There is substance to this contention. Yet the scheme involved in the 1938 ordinance remains even with the call feature added, one of twenty year financing rather than one of fifteen. The call provision, as pointed out above, would enable the city to refund the bonds if favorable changes in interest rates prevail at some time in the future, and thus is of advantage to the city. Whether a twenty year or a fifteen year financing plan is preferable is a financial and economic question, as to which reasonable minds might differ. It might be argued in favor of the one that it would be on the safe side of the proposed plant's earning capacity—and for aught that appears this change may have been made with this thought in mind. As to the other, it might be argued that it would enable the city to pay for the plant over the longest period of time consistent with freeing its net income for future modernization and for additional plant capacity necessitated by the needs of a growing community. Many people might feel that it is preferable to pay greater amounts annually and reduce the total interest paid thus compelling economy. rather than to extend the payments over a greater number of years. The policy of the voters relative to the means and manner of financing the proposed plant is enunciated in their legislative enactment of October, 1936. That financial policy is departed from in the subsequent ordinance. The enactment of the twenty year plan is not administrative of the legislated fifteen year plan. If such a change is adhered to, the voters are entitled to a referendum on the change. It goes beyond administrative detail and into the field of legislative policy. City of North Sacramento v. Irwin, 94 Cal.App. 652, 271 P. 788, 272 P. 767; Cairo & St. Louis R. Co. v. City of Sparta, 77 Ill. 505, 508; Town of Big Grove v. Wells, 65 Ill. 263, 266.

Plaintiffs rely strongly on two recent Kentucky cases in support of their position as to the several changes challenged: Kentucky Utilities Company v. Ginsberg et al., 255 Ky. 148, 72 S.W.2d 738; and Board of Commissioners of City of Middlesboro v. Kentucky Utilities Company, 267 Ky. 99, 101 S.W.2d 414, being two phases of a municipal electric light plant controversy.

An examination of the first of these reveals that the ordinance which it was held was referable was, as stated by the Kentucky court, so totally different from the earlier one under consideration "that the former cannot by any stretch of argument be considered an amendment of the latter." 72 S.W.2d at page 743. The second case but held that an ordinance passed, evidently to avoid the effect of the ruling in the Ginsberg case, was not materially different from that held referable in such case, and hence was governed similarly by the statute of Kentucky relating to referendum.

It is the conclusion of the court, therefore, that the ordinance passed by the Board of Commissioners of Provo City on August 5, 1938, embodying as it does legislative matter, is subject to referendum, and, hence, that a peremptory writ should issue commanding its submission as requested by plaintiffs. Costs to the plaintiffs.

Such is the order.

PRATT, J., concurs.

Wolfe, Justice (concurring). I concur in the opinion of Mr. Justice McDonough except as to the order made. I think the order should require only the legislative parts of the ordinance to be referred and not the whole ordinance. The parts are not interdependent. They might have been ordained in separate ordinances. The old law was that a prayer for mandamus was a unit. If the officer could not be commanded in all he could not be commanded in any part. In later times when the petition was to command him to do separate acts and some were required and others were within his discretion, the former only were compelled where the acts sought to be compelled were not tied into each other in such a manner that the commanding of the purely ministerial act

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would be denying the officer his possessed discretion as to the remaining acts. The writ, I think, is now sufficiently flexible to permit severable parts to be referred and the others to be withheld. In consequence I think the order should so read.

LARSON, JUSTICE (concurring in part, dissenting in part). I concur in the order making the alternative writ of mandate and the alternative writ of prohibition in aid thereof permanent. But I think the majority opinion recognizes a rule of practice and procedure which is neither in harmony with the purport of our statutes concerning referendum nor with fundamental democratic ideals, nor with the public weal and welfare. That opinion recognizes or authorizes the practice and the right of any city or town recorder or county clerk to refuse to obey the plain, specific, and positive mandate of the statute just because in his opinion it may at some time in the future result in an abortive or ineffectual thing. . . .

In the instant case the duties of the city recorder are clearly set forth and defined in the statutes. Nothing is left to judgment or discretion. Every step he must take, the time and method of doing it and the result thereof are prescribed. There is no public interest at stake or in any way involved. No restrictions are placed upon the public; no rights of the city limited, curtailed, expanded, construed, acted upon or influenced. No obligation is imposed upon the city; no city money expended; city property used, or city activities affected. The matter is wholly between the sponsors and the incumbent of the city recorder's office. He took their money and then refused to perform his duties for which they paid him. It may be that the printing bids would be so high or because of a change of heart that the sponsors would abandon this idea. It may be that if the petitions were printed and circulated the sponsors could not obtain the requisite number of qualified signers, or they may be signed by 95% of the qualified signers in the city and still they may never be filed, asking for a referendum. Up to this stage neither the city corporation nor the public interest is or can be affected by the proceeding had. What is being done does not affect the management, control, business, enterprises, finances, activities or general police powers or duties of the city. How then can the duty of the recorder be anything but a purely clerical duty which he must perform without equivocation or delay?

If at any time the recorder may be regarded as engaged in executive duties so as to permit him to question the right to a referendum, it would seem clear that such time is when a proper and sufficient petition is presented calling for the referendum, and the acceptance and filing of which by him prevents the ordi-

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nance from going into effect, stays the hand of the city officials, and for a time at least abates or holds up the policy which the city, through its commission, would otherwise pursue. As to whether he can raise the question at all we need not now decide. Certainly he may not raise the question when he did here. I concur therefore in the order making the writ permanent. I think costs should be taxed against the defendant personally.

MOFFAT, CHIEF JUSTICE. I concur in the result reached in the opinion of Mr. Justice McDonough and in what is said by Mr. Justice Larson in his opinion concurring in part and dissenting in part.

SECTION 5. SANCTIONS

In these days of expanding administrative law the problem of providing legal sanctions, which are both fair and effective, to support governmental action, is being given much more searching consideration than formerly. Penal sanctions, whether in the form of fine or imprisonment, or both, and forfeitures, however classified, are just two of various possible types. Various civil sanctions administered by the courts may be employed. They include actions for simple or multiple damages at the instance of government or affected individuals, specific redress whether in the form of an injunction or otherwise and defenses grounded on illegality. Informer statutes are essentially sanctions. Then, of course, there are many sanctions applied and administered primarily by administrative authorities. The licensing device, with the possibility of suspension or revocation is a conspicuous example. Impounding and even destruction of things which endanger public health or safety is an old method. Impounding has been resorted to in the case of improperly parked vehicles as well as stray animals. McLaurine v. City of Birmingham, 24 So. 2d 755 (Ala. 1946); Steiner v. City of New Orleans, 173 La. 275, 136 So. 596 (1931), discussed in 18 Va.L.Rev. 312 (1932). The taxing power may be used as a sanction, whatever be the merits of the familiar contention that this is a perversion. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S.Ct. 907 (1940).

Sanctions should be patterned to the type of regulation, prohibition or control and the substantive policy which they are fashioned to support.

The sanctions which stand behind the measures of local legislative bodies depend upon positive law. The legislature may be specific as to the methods of enforcing ordinances or it may grant the local body some discretion in the matter. In either case the legislature has set the limits of local action. While the power to

regulate may carry the incidental power to attach a sanction, the power to resort to a particular type of sanction will depend upon a grant of authority by the legislature which is independent of the substantive power invoked. II Dillon, Mun. Corps. § 617 (5th ed. 1911).

Hines, Director General of Railroads, v. Partridge, 144 Tenn. 219, 231 S.W. 16 (1920), was a wrongful death action arising out of a grade crossing collision between a train and an auto in which deceased was a passenger, which occurred in the City of Chattanooga. An ordinance limited the speed of trains to four miles an hour at the crossing and required that flagmen be kept on duty there. On the questions whether the ordinance was rendered invalid by its failure to prescribe a penalty for its violation and whether the speed limit was void as unreasonably low the court had this to say (at 144 Tenn. 229, 231 S.W. 19):

"We do not think it can be said that the provision of the ordinance relating to the keeping of flagmen on duty at said crossing is void because it fails to prescribe a penalty. We think that, notwithstanding the ordinance prescribes no penalty for its violation in this regard, it is one the defendant was bound to observe, and its failure to observe it was negligence per se. The ordinance is in the nature of a police regulation, it is true, and while the municipality could not enforce it by a criminal proceeding, or a proceeding in its nature criminal, it prescribed a rule of conduct which the defendant was bound to observe in the operation of its trains, for the safety of persons using the highway. The very object of the ordinance was to protect persons using Market street against injury from the operation of the defendant's trains at said crossing. The defendant had previously recognized and accepted this ordinance by keeping two flagmen at this crossing for the purpose of performing the duties imposed by said ordinance, and it was insisted by the defendant that said flagmen were in the performance of their duties at the time of the accident, though, as before stated, the jury found this contention against the defendant.

"In Chicago, etc., R. R. Co. v. Hines, 82 Ill.App., 488, it was held that a statutory prohibition is equally efficacious, and the illegality of a breach of the statute is the same, whether a thing be prohibited absolutely, or only under a penalty. That was a suit brought by the plaintiff, Hines, to recover of the railroad company for personal injuries resulting to him from the negligence of the railroad company in violating a speed ordinance of the city of Chicago, in the operation of one of its trains. The court, in passing on the validity of the ordinance said:

'Neither do we think the ordinance ineffective because it does not appear that a penalty is prescribed for its violation. The section is expressly prohibitive in terms, and is certified by the clerk to be a true copy of section 1830 of the Municipal Code of the city passed by the city council, etc. Blackstone defines municipal law as "A rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what it (sic) wrong." 1 Cooley's Bl. marg. p. 44. A statute may be expressly prohibitory, or it may be prohibitory by implication, as by prescribing a penalty. Sedgwick on Con. of Statutes (2d Ed.) p. 71; 1 Kent's Com. (12th Ed.), 567.'

"The latter author says: "The principle is now settled that the statutory prohibitions is equally efficacious, and the illegality of a breach of the statute is the same whether a thing be prohibited absolutely or only under a penalty."

"To the same effect is the rule announced in the case of De Scheppers v. Railroad, 179 Ill.App., 298.

"The court of civil appeals, in its opinion, cites cases from New Jersey, Vermont, and Kansas to support its holding that the ordinance in question, in so far as it imposed the duty on the defendant to keep flagmen at the crossing where the accident occurred, is void, because it does not prescribe a penalty for its violation in this particular; but when those cases are examined it is found that in each case the ordinance involved prescribed some duty for the protection of the municipality itself, and not for the protection of individuals composing the municipality. There is a marked distinction between the two classes of ordinances. The former can be enforced only by means of a penalty, while as to the latter the violator may be called to answer in a civil action by the individual who suffers injury by reason of its violation. McQuillin on Municipal Corporations, vol. 2, sections 673, and 674.

"We do not understand that counsel for the defendant controvert the general and well-established rule to the effect that the violation of such an ordinance, if it be valid, is negligence per se; but it is insisted that the ordinance in question is unreasonable because it limits the speed of trains to four miles an hour at said crossing. We cannot assent to this contention. To justify the courts in declaring void an ordinance limiting the speed of railroad trains within the limits of a city, its unreasonableness, or want of necessity, as a police regulation, must be clear, manifest, and undoubted. Central R. & Bkg. Co. v. Brunswick, 87 Ga., 386, 13 S.E., 520; Gratiot v. Railroad, 116 Mo., 450, 21 S.W., 1094, 16 L.R.A., 189; Louisville & W. R. Co. v. Webb, 90 Ala., 185, 8 South., 518, 11 L.R.A., 674.

"In this last case it was held that an ordinance limiting the rate of speed of locomotives moving within the city to four miles an hour was a reasonable police regulation. "Numerous cases could be cited holding similar ordinances reasonable, and especially is this true of ordinances applying to trains and locomotives being operated within and through populous sections of cities, and over muchly traveled streets. The evidence shows that Market street, in the city of Chattanooga is the principal street of the city, and is extensively traveled."

STATE ex rel. KEEFE v. SCHMIEGE

Supreme Court of Wisconsin, 1947. 251 Wis. 71, 28 N.W.2d 345.

. . . On April 6, 1946, action was begun by the county of Winnebago against Franklin D. McDonald. The district attorney charged the defendant with violation of a county ordinance prohibiting the driving of an automobile while intoxicated instead of prosecuting him under the statutes (sec. 85.13 and sec. 85.91(3)). Upon demand of the defendant, the municipal court ordered a jury trial. Because the ordinance made no provision for a jury trial, the district attorney petitioned the circuit court for a writ of prohibition to prevent the enforcement of the municipal court's order in that respect. From an order and judgment of the circuit court, entered July 5, 1946, denying the petition of the district attorney, the county appeals.

FAIRCHILD, JUSTICE. When the matter was first presented here, the point raised by the county was that because this is a prosecution for the violation of an ordinance and because there was no provision or requirement in the ordinance itself for a jury trial, the proceedings must be summary and therefore the circuit court was in error in denying the petition of the district attorney.

The ordinance in question provided as follows:

"Section Two—Operation by Intoxicated Persons or Users of Narcotic Drugs Prohibited. It shall be unlawful for any person . . . who is under the influence of intoxicating liquor or narcotic drugs, to operate any vehicle upon any highway

"Section Three—Penalty. Any person violating any of the provisions of Section Two or Three of this Ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof, in addition to any other penalty provided by law, shall be punished by a fine of not to exceed \$100.00 or by imprisonment in the County Jail for not more than six months, or by both such fine and imprisonment"

That ordinance was passed in November, 1941, and was therefore controlled by sec. 85.84 and sec. 59.07(11), Stats., 1941, which contain the following pertinent provisions:

Sec. 85.84 Stats., 1941: "No local authority shall have power to enact, pass, enforce or maintain any ordinance, resolution, rule

or regulation requiring local registration or other requirements, inconsistent with the provisions of this chapter, or in any manner excluding or prohibiting any motor vehicle, trailer, or semi trailer, whose owner has complied with the provisions of this chapter, from the free use of all highways except as provided by section 66.45; but the provisions of this section . . . shall not prohibit any local authority from passing any ordinance, resolution, rule or regulation in strict conformity with the provisions of this chapter and imposing the same penalty for a violation of any of its provisions except the suspension or revocation of motor vehicle operators' licenses."

Sec. 59.07 (11), Stats., 1941: "The county board of each county is empowered at any legal meeting to . . . Enact ordinances or by-laws regulating traffic of all kinds on any highway, except street or interurban railways, in the county which is maintained at the expense of the county and state, or either thereof; declare and impose forfeitures, and enforce the same against any person for any violation of such ordinances or by-laws; provide fully the manner in which forfeiture shall be collected; and provide for the policing of such highways and to provide for what purposes all forfeitures collected shall be used."

After briefs were submitted a question arose as to the power of the county to declare an act a misdemeanor and as to the validity of the ordinance under which the prosecution was undertaken. Certain questions for discussion were presented to the parties and requests were made for briefs from any one interested in the questions raised. Those briefs were filed in this court by May 26, 1947. The questions raised were as follows: First, sec. 85.84 purports to confer upon the county board the power by ordinance to (a) declare an act a misdemeanor (b) impose a penalty of fine, fine and imprisonment, or imprisonment. May the legislature lawfully confer such power upon a county board? Second, since the county board, under the amendment of 1943, must enact an ordinance in strict conformity with the provisions of the chapter, including those relating to penalty, may the county board omit imprisonment from the penalty provision of the ordinance? If it may not, can this court treat provisions in the ordinance for punishment by imprisonment as separable from the balance of the ordinance?

At the time these briefs were considered sec. 62.23(7) (f) and sec. 66.05(10) (m) came to our attention. While they are not directly involved here, they do use the term "misdemeanor" with relation to ordinances. We have had them in mind as we considered the issues here presented by both sets of briefs. We have reached the conclusion that the legislature does not have the authority to confer upon a county board the power to enact by ordi-

nance a rule determining that a violation of a local ordinance shall be a misdemeanor. Since the county board had no power to enact a rule declaring drunken driving to be a misdemeanor, that feature of this ordinance, being inseparable from the rest, makes the ordinance invalid.

At the time the ordinance in question was passed, Winnebago county clearly had authority under sec. 59.07(11) to enact ordinances regulating local traffic and punishable by a forfeiture. It is claimed that sec. 85.84 Stats., 1941, gave the county power to term the violation a misdemeanor and to provide for punishment by imprisonment inasmuch as it provided that no local authority was prohibited from passing an ordinance in strict conformity with and imposing the same penalties as the state motor vehicle law. Since sec. 85.91(3), in setting forth the state law pertaining to penalties for drunken driving, provided that a violation of the act would be a misdemeanor and punishable by fine, imprisonment or both, it is argued that the "strict conformity" provision of 85.84 granted the county board power to do what was done here.

The language of sec. 85.84 as it was in 1941, although not prohibiting any local authority from passing ordinances in strict conformity with the state law, did not grant to local authorities the power they did not otherwise have to declare a violation of an ordinance to be a crime and to provide for imprisonment as a punishment. That section was later amended, however, so that it now contains an affirmative grant of power to local authorities to pass regulations in strict conformity with the provisions of the state law. See sec. 85.84 Stats., 1943. It is argued that the subsequent adoption of that amendment is persuasive of the validity of the county's present ordinance.

Sec. 85.84 must be held to be invalid insofar as it attempts to grant to the municipal or county authorities the power to treat the violation of an ordinance as a misdemeanor and to impose penalties other than forfeitures and imprisonment necessary for the enforcement of the forfeitures.

By definition long antedating the constitution of this state, a crime has been defined as an offense against the sovereign and a criminal action "one prosecuted by the state against a person charged with a public offense committed in violation of a public law." State v. Hamley, 137 Wis. 458, 119 N.W. 114, 115. Although not independently material, this is recognized by sec. 260.-05 Stats., which provides, "Actions are of two kinds, civil and criminal. A criminal action is prosecuted by the state against a person charged with a public offense, for the punishment thereof. Every other is a civil action." A county is not a sovereign, and to permit it to create a crime is to raise it to the dignity of a sovereign. It is true that art. IV, Sec. 22 provides: "The legis-

lature may confer upon the boards of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe."

We shall not unduly extend this opinion by speculating whether this section authorizes the delegation by the legislature of essentially sovereign powers because the delegation of such powers is to the counties as state agencies and falls far short of making sovereign states out of counties. The sovereign alone can create a crime. A misdemeanor is a crime (State v. Slowe, 230 Wis. 406, 284 N.W. 4), and since sec. 85.84 Stats. delegates to the counties power to create a crime, it is void as an attempt to confer sovereignty upon the counties. On the other hand, the legislature may confer upon the boards of supervisors power to create civil actions to recover fines for the violation of county ordinances. This is the power of a "local, legislative and administrative character" referred to by art. IV, Sec. 22. As an adjunct to punishment by fine, "not as a part of the punishment, strictly speaking, but as a means of enforcing payment of the fine and costs—that is, of making the element of punishment effective," (Starry v. State, 115 Wis. 50, 90 N.W. 1014) the legislature may authorize the imprisonment of defendants in such civil action in case of failure to pay fines imposed. This process of collecting fines is analogous to the body execution in the case of torts, is of ancient origin, antedates the constitution and is of undoubted validity. To authorize imprisonment in a civil action created by a county for violation of an ordinance as a punishment and not as a mere device to enforce collection of a fine cannot be sustained (1) because, viewed as an attempt to authorize the creation of a crime, it is void for reasons heretofore discussed or (2) because, viewed as prescribing imprisonment as a punishment in a civil action and not to make effective the imposition of a fine, it violates Sec. 2, art. I of the constitution which provides: "There shall be neither slavery, nor involuntary servitude in this state, otherwise than for the punishment of crime, whereof the party shall have been duly convicted."

In our examination of the authorities we have discovered only two that are seemingly contrary to the position here taken, although each case had to do with the validity of a statute passed under the home rule amendment. These are Hack v. Mineral Point, 203 Wis. 215, 233 N.W. 82, and Janesville v. Heiser, 210 Wis. 526, 246 N.W. 701. After a careful reconsideration, we are of the view that the doctrine of these cases cannot be maintained and that the power cannot be granted cities and counties to use imprisonment other than for the purpose of collecting or enforcing the collection of a fine. Nothing in this opinion is to be taken as in any way casting doubt upon the power of the legislature to vest in a county board or municipal council power to

provide for the good order of the community by enacting ordinances regulating local affairs, provided there is not included the power in either to create crimes and impose criminal punishments. Under such a grant of power the county or municipal government may enact ordinances prohibiting some of the very acts already prohibited by state law, and in such a case there may be a prosecution under the state law as and for a crime and a civil action under the local ordinances for the recovery of a fine. Prosecution under the state law is a criminal action, the other a civil action, and the result in the one does not bar the prosecution of the other. Ogden v. City of Madison, 111 Wis. 413, 87 N.W. 568, 55 L.R.A. 506.

For the reasons we have advanced that portion of the Winnebago county ordinance declaring drunken driving to be a misdemeanor and imposing punishment by fine, imprisonment or both is invalid. Whether that portion of the ordinance is severable from the rest so as to permit the enforcement of the rest as a valid regulation, is the next problem to be considered. The ordinance specifically provides for a penalty to be imposed "upon conviction thereof". Were the excessive and unauthorized punishment provisions for imprisonment all there were to test interpretation, the rule of such cases as City of Milwaukee v. Johnson, 192 Wis. 585, 213 N.W. 335, might apply, and the objectionable provisions separated so as to leave the valid portions of the ordinance unaffected. But that is not the type of an enactment we are dealing with. Here the application of the provisions for punishment is made to depend on the defendant's being convicted of the misdemeanor. The punishment provisions and the declaration that a violation of the ordinance is a misdemeanor are so closely connected as to be incapable of severance. The court cannot rewrite the ordinance. Taken together, the idea of crime and of punishment by imprisonment indicate an attempt on the part of the county to enact a criminal statute. That is a power the county cannot have, and the ordinance must therefore be held to be invalid.

We agree with the learned trial judge that before this defendant could be held to be guilty of a misdemeanor, he would be entitled to a jury trial if he desired it. The ordinance is invalid. If there is a prosecution for the commission of a misdemeanor, it will have to be in the name of the state under the statutes of the state.

The order and judgment are reversed with directions to grant the petition for a writ of prohibition.

Chapter 6

FINANCE

Emphasis upon sound organization and efficient administration is a comparatively new force in local finance. The vital relationship of financial planning and management to good public service is widely appreciated today, although preoccupation with the mechanics of fiscal operations may have the effect of honoring form and procedure at the expense of considerations of social utility in the distribution of public funds. John A. Perkins, "Preparation of the Local Budget" 40 Am. Pol. Sc. Rev. 949 (1946).

The trend, in city government in particular, is toward centralizing all financial functions in a single department. The department of finance would embrace accounting, budget-making, current or pre-audit of expenditures, revenue administration, the custodial function, purchasing and debt administration. A considerable body of opinion favors a department headed by one person directly responsible to the chief executive. Quite commonly, however, we find a pattern of elective officers not in harmony with a scheme of centralized executive responsibility.

The accounting function is patently vital to good management. While, with respect to the expenditure side of the budget, accounting on an accrual rather than a cash basis is favored, the experts disagree as to the better method of accounting for income. Some units use the cash basis as to revenues and the accrual basis as to expenditures. The National Municipal League has prepared two alternative model budget laws for counties and municipalities. One embodies the accrual revenue system and the other a cash basis plan.

SECTION 1. BUDGETS AND APPROPRIATIONS

It has been said that "a budget is a plan of proposed expenditures for a given period or purpose and the means of financing them." Carl H. Chatters and Irving Tenner, Municipal and Governmental Accounting 194 (1941). In most states the regular legislative sessions are biennial and a state budget covers a two year span consisting of two fiscal years. Current local budgets, however, normally relate to one-year periods. This means that a local budget is a fiscal plan for a fiscal year. It must be evident that there are rather strong reasons for making local and state fiscal years uniform. If, for example, there is to be effective state administrative supervision of local finance a certain amount of

standardization will be necessary as to such general features as the basic operating period. There are advantages, moreover, in having the local fiscal year conform to that of the state, especially where state revenues are shared with local government. Actually, these matters vary from state to state.

Local expenditures may be restricted by statutes establishing special funds. Budgeting is necessary as to them, however, along with the general fund, in order to fix the amounts to be expended for the various authorized objects of expenditure.

In some instances the preparation of a budget is a function of the finance committee of the local governing body. As we have already observed, however, the tendency has been toward centralized financial administration in local government with central executive responsibility for budget preparation and for execution after adoption by the governing body. The chief executive, with the aid of a budget director or other assistants, prepares a budget grounded upon departmental estimates of expenditures and the finance officer's estimates of revenues. The time schedule is usually such that the budget, supported by a budget message, reaches the governing body in time for final action before the fiscal year to which it relates begins. Statutory requirements that proposed budgets be subjected to public hearings are not uncommon. It has been suggested that public hearings are now usually ineffective because they are held too late in the budget process to permit of reconsideration of service objectives and standards. John A. Perkins "Preparation of the Local Budget" 40 Am. Pol. Sc. Rev. 949, 951-952 (1946).

At the minimum a modern local budget contains in tabular form a general summary, detailed estimates of all anticipated revenues applicable to proposed expenditures and the proposed expenditures. See Section 5 of Article IV of the Model Accrual Budget Law (National Municipal League, 1946). The executive submits the budget to the governing body with an explanatory budget message. This he supports with schedules, exhibits and other material bearing upon debt service and capital improvements as well as current operations. The entire "package" is known as the budget document. Under one type of fiscal procedure adoption of a budget constitutes an appropriation of funds in accordance with the budgeted outlay. Section 126 of the home rule charter of New York City embraces this method. Where it is not so provided, an appropriation ordinance or resolution must be adopted to provide the legal basis for expenditure. Some of the anticipated revenues relied upon to meet appropriations will come in without further legal action by the unit. So it is, for example, with utility revenues, service charges and non-property taxes, levied on a continuing basis. Property taxes, however, are

levied annually, the general levy to produce an amount which, when added to other income, will provide for general fund outlay, and special levies to meet special fund requirements.

How specific must appropriations be? As a matter of policy the executive usually prefers lump sum appropriations grounded upon detailed budget estimates. This aids in budget execution since the executive may make and revise allotments within a lump sum appropriation in keeping with revenue receipts and the work program of the given department. As a matter of law, the answer to our question depends, of course, upon statute or charter. In Illinois, for example, in municipalities of 500,000 or less inhabitants, which operate under general law, the annual appropriation ordinance must "specify the objects and purposes for which these appropriations are made, and the amount appropriated for each object or purpose." Ill.Rev.Stat., c. 24, § 15-1 (1945). There are similar requirements as to other local units.

PEOPLE ex rel. SCHLAEGER v. REILLY TAR AND CHEMICAL CORPORATION

Supreme Court of Illinois, 1945. 389 Ill. 434, 59 N.E.2d 843.

WILSON, JUSTICE. The defendant, Reilly Tar & Chemical Corporation, having previously paid its taxes in full, under protest, filed objections in the county court of Cook county to an application of the county collector for judgments against and orders for the sale of real estate for the nonpayment of certain taxes for the years 1941 and 1942 levied by the city of Chicago and the board of education of the city. From the judgments overruling these objections for the years 1941 and 1942, respectively, the tax-payer has prosecuted separate appeals. The appeals have been consolidated for consideration and opinion, the issues involved being identical. Objections to the taxes for 1941, only, will be considered. Disposition of them, it is agreed, will be decisive with respect to like objections for the year 1942.

Defendant interposed objections to eighteen items included in the appropriation ordinance of the city of Chicago and the tax levy ordinance, aggregating \$135,200. The items range from \$1000 to \$25,000. Only five exceed \$7000. Illustrative items are:

Committee on Buildings and Zoning	
For expenses of the Sub-committee on Re-	
zoning of the city	\$ 2,000.00
Committee on License	
Operating expense of committee	4,600.00
Chicago Recreation Commission	
Operating expense of committee	25,000.00
Committee on Standards & Tests	
Operating expense of committee	1,000.00
	For expenses of the Sub-committee on Rezoning of the city

Defendant charged that the items quoted and the other fourteen are not itemized as required by law and are, consequently, void. Applicable principles have been frequently stated. The right of a taxpayer to have stated separately what are the purposes for which public money is appropriated is firmly established, and a levy not sufficiently definite to apprise him of the purpose for which the money is to be expended is invalid. People ex rel. Schaefer v. New York. Chicago & St. Louis Railroad Co., 353 Ill. 518, 187 N.E. 443. His right to have separately stated the purpose for which public money is appropriated or a tax levied is a substantial right of which he may not be deprived. People ex rel. Toman v. Signode Steel Strapping Co., 380 Ill. 633, 44 N.E.2d 555. On the other hand, it is equally settled that specification of each particular item of expense for which a levy is made is not required. A single appropriate general purpose is sufficient to include every expenditure although there be many items. People ex rel. Lindheimer v. Hamilton, 373 Ill. 124, 25 N.E.2d 517. This is especially true where it is difficult to determine, in advance, the exact amount of the various items. In short, itemization requirements must be accorded a common-sense construction. People ex rel. Toman v. Estate of Otis, 376 Ill. 112, 33 N.E.2d 202.

Each of the challenged appropriations bears an "S" designation. This letter, according to an exhibit consisting of "Classification of Accounts and Commodity Code" explaining the classification of expenditures, refers to "Temporarily Unclassified Items." A detailed explanation follows: "Expenditures for specific purposes which are required to be further itemized as expended according to standard accounts. Appropriation shall be made to this account only when it is impracticable to estimate in advance the classification under standard accounts and the items shall be classified under the proper standard accounts as expended". The appropriations are for committees of the city council. No part can be for salaries or other compensation of the members of the committees, for the reason that the members are aldermen who receive the maximum salary permitted by statute. Operating expenses necessarily include salaries for clerical assistance, travel, and the purchase of supplies and printing. Typewriters, desks, chairs, or other items of equipment would constitute capital expenditures, and not "operating expense," as defendant asserts. It further appears that where an appropriation for a committee is substantial, in comparison with the total amount of appropriations, it has been itemized in considerable detail. It does not follow that because appropriations of \$94,274 for the Committee on Finance, \$135,000 for the Chicago Plan Commission, and \$41,000 for the Public Vehicle License Commission permit of itemization that an appropriation of \$1000 for the

Committee on Standards & Tests also lends itself to itemization. The "operating expense" of the seventeen committees and the Chicago Recreation Commission states but a single general purpose, and adequate light is given the taxpayer of the purpose for which the money is to be expended. The objections to the committee appropriations and levies were properly overruled.

Next, defendant objected to the following item in the appropriation and levy ordinances:

"63-K-30 For hire of teams, carts and motor trucks as needed at the rates specified: Motor trucks, tractors, trailers and other equipment at established rates Team hire at not to exceed \$11.75 per day Carts at not to exceed \$8.00 per day Single horses and drivers on weed cutters at \$8.00 per day \$2,420,000"

The gist of the objection is that the quoted item is indefinite, vague, and not properly itemized. An appropriation of the city of Chicago for the year 1937, similar to the appropriation quoted, was involved in People ex rel Toman v. Sage, 375 Ill. 411, 31 N.E. 2d 791. The item commenced: "For hire of teams, carts and motor trucks as needed at the rates specified and for the purchase of waste collection equipment when approved by the city council: Motor trucks at established rates." This court decided that "purchase" and "hire" were separate purposes, one representing a capital investment and the other a current expense, and that the amount for each should have been separately stated. The 1941 appropriation ordinance, conformably to our decision in the Sage case, omitted the words, "and for the purchase of waste collection equipment when approved by the city council." Between the words "Motor trucks" and "at established rates" were inserted the words "tractors, trailers and other equipment." Defendant concedes that the appropriation now assailed satisfies the objection involved in the Sage case. It complains, nevertheless, that it is uncertain, vague, indefinite and unintelligible.

In People ex rel. Gibbons v. Clark, 296 Ill. 46, 129 N.E. 583, 586, the appropriation and tax levy ordinances of the city of Chicago contained the following: "For cleaning of streets, collection and removal of garbage, ashes and miscellaneous refuse, and for the repair of unimproved streets, sidewalks and miscellaneous street work, and for the maintenance and operation of buildings and equipment in connection therewith, \$3,510,000." This court observed that if the appropriation had been made "for cleaning streets and alleys" it would have specified a distinct object and purpose and would have been a legal appropriation, adding: "Because the city council went farther and grouped under the general heading many details embraced within the general purpose furnishes no valid ground for holding the tax levy void." The appropriation considered in the Clark case included as one of the details of the single general purpose of cleaning streets, "maintenance and operation of buildings and equipment in connection therewith." In the present case, the appropriation is considerably narrower in its scope than the appropriation approved in the Clark case. Here, the item appears in the list of appropriations for the Bureau of Streets and is found among several items under the subdivision "Street and Alley Cleaning Division." It should be considered in its proper perspective with the entire appropriation for the Bureau of Streets, and when so considered, it states a single purpose, namely, the removal of waste material from the streets and alleys of Chicago. Incident to the execution of this general purpose, it is necessary to hire teams, carts, motor trucks. tractors, trailers, and like equipment. Defendant's argument that the words "other equipment" cast doubt upon the object of the appropriation is without merit. These words follow the specific enumeration "motor trucks, tractors and trailers." The familiar principle of ejusdem generis is applicable. Spalding v. People, 172 Ill. 40, 49 N.E. 993. Defendant asserts that it cannot ascertain from the appropriation what portion of the money will be expended for trucks, tractors, trailers, and other equipment, respectively. It does not stand in an isolated position in this regard. Obviously, the city itself could not, at the time of the passage of the ordinance, know how many trucks, trailers, and tractors would be required. Upon the authority of People ex rel. Toman v. Sage, 375 Ill. 411, 31 N.E.2d 791, and People ex rel. Gibbons v. Clark, 296 Ill. 46, 129 N.E. 583, the second objection was properly overruled.

The judgment of the county court of Cook county, to the extent it overruled defendant's objections to the taxes levied by the city of Chicago, is affirmed. So far as it overruled the objections to taxes levied by the board of education, the judgment is reversed and the cause is remanded, with directions to sustain these objections.

Affirmed in part and reversed in part and remanded, with directions.

An important adjunct of budget execution is so-called current or pre-audit. The minimum required of the comptroller or other responsible financial officer in performing this function is to determine that the particular item is an approved claim covered by an appropriation under which there are funds available for payment. Post-audit is quite another matter. In principle it is an aid to the legislative branch in checking upon executive and administrative performance and, thus, should be done by hands not under executive control. Not uncommonly the job is done by a state agency or by accountants engaged in private practice who are retained for the purpose. If a lump-sum appropriation plan is followed, post-audit becomes the more important as a check upon the work of the executive.

Capital budgeting, co-ordinated with the work of local planning commissions, has gained ground in recent years. As developed in the New York City charter the capital budget is separate from the "expense budget" and, while based on planning for a total period of six years, is, like the expense budget, set up for one year at the time (the capital budget for a calendar year and expense budget for a July 1 through June 30 fiscal year). As a general rule no city obligations may be issued for a capital project not included in the capital budget. This plan is based upon borrowing rather than the levy of an annual tax for capital purposes. It is to be borne in mind that where resort is had to long-term borrowing, the authorization of the issuance of bonds or other obligations usually constitutes an appropriation of the proceeds to the indicated purpose. See, for example, N.C.Gen.Stats. § 160-399 (1943).

In small units the tax levy method is not calculated to produce enough in a given fiscal year to finance a substantial capital project. The purpose can be achieved, however, by building up a reserve over a period of several years. While there is authority that without express grant of power a local unit may impose a levy large enough to provide the funds necessary to enable it to operate on a cash basis, the courts are loathe to rest power to tax to provide a capital outlay reserve upon implication. See People ex rel. De Rosa v. Chicago and N. W. Ry. Co., 391 Ill. 347, 63 N.E.2d 401 (1945); People ex rel. Leaf v. Roth, 389 Ill. 287, 59 N.E.2d 643 (1945). This reserve-fund idea antedates World War II. but the desire to make provision for post-war improvements is what brought it in favor with state legislatures. By December 31, 1945, twenty-six states had enacted laws authorizing one or more types of local units to set up some form of capital outlay Municipal Yearbook 1946, 191 (Inter'l City Mgrs.' reserve. Ass'n).

New York and New Jersey have a "down-payment" plan, which requires a local unit to include in its budget a minimum appropriation of a fraction of the cost of a capital project to be partly financed by bonds in the fiscal year. This feature is to be found also in the Model City Charter. The design is to stimulate capital planning and to put a brake on ill-considered borrowing.

Some measure of state administrative supervision or control of local budgets and expenditures exists in the majority of the states. The subject is considered by Wylie Kilpatrick in State Supervision of Local Finance, 23 et seq. (Pub.Admin.Serv.No.79, 1941.) State participation in local budgeting may be based on the theory of local responsibility kept in bounds by state supervision. Thus, in New Jersey, pre-audit of local budgets by the Director of Local Government is designed to assure legality, prevent mistakes and to bring about a balanced budget. This involves control of budget form and arrangement and review of a budget in the light of a detailed annual financial statement. The New Jersey plan substitutes state control only when local administration has resulted in defaults or other fiscal difficulties. In other states, notably New Mexico, actual state control of local expenditure exists as the normal system.

CUMMINGS v. CITY OF SCRANTON

Supreme Court of Pennsylvania, 1944. 348 Pa. 538, 36 A.2d 473.

PATTERSON, JUSTICE. This appeal by the council and certain employees of the City of Scranton is to determine whether the council of a city of the second class A has power to appropriate surplus funds, representing an unused balance under the general appropriation ordinance for the year, for the purpose of increasing salaries of some employees, without a certification by the mayor of an existing emergency, as required by the Act of 1901, P.L. 20, as amended by the Act of 1911, P.L. 461, 53 P.S. § 9503. We are of opinion that the court below properly held that the council does not possess such power.

The Act of 1901, P.L. 20, as amended by the Act of 1911, P.L. 461, 53 P.S. § 9503, governing appropriations by cities of the second class A, provides: "All taxes shall be levied and appropriations made annually, by general ordinances, prior to the first Tuesday of February, except . . . as may be made to provide for the payment of the principal and interest of any bonds to be issued, and except also in cases of emergency, when, on a certificate signed by the mayor and controller that such emergency exists, a special appropriation may be made to meet the same." The exceptions permitting special appropriations are admittedly not here involved. The legislative mandate that all appropriations shall be made annually by general ordinance prior to the first Tuesday of February is clear. The Act of 1941, P.L. 416, 53 P.S. § 10720, in no way alters the effect of that statute. It merely prescribes the procedure to be followed in enacting the annual appropriation ordinance.

On December 17, 1942, city council, complying with the procedure required by the Act of 1941, supra, enacted its annual appropriation ordinance wherein were set forth an estimate or budget of the various items of expense to be incurred during the succeeding year, including salaries of employees. On April 20, 1943, council introduced an ordinance to amend the appropriation ordinance of December 17, 1942, "by transferring and appropriating certain funds and increasing the rate of salaries for certain employees in the various departments." On May 5, 1943, the date for the third reading of said ordinance, the title thereto was amended and the departments to which the appropriations should be applied were named. As amended, the ordinance was passed the first, second, and third readings and adopted the same day. This ordinance was vetoed by the mayor. By a vote of 4 to 1 council passed the ordinance over the veto. The funds attempted to be transferred and reappropriated consist of an unexpended balance for the year 1942, and a balance from salary appropriations for 1943 arising by reason of the induction of certain employees into the armed forces. Warrants were subsequently drawn for W. C. Miller and John T. Trunzo, intervening appellants, in accordance with the supplemental appropriation ordinance. This bill in equity by Emily Cummings, Amber Jones, and Leland Marsh, resident taxpayers, appellees, was filed, praying for the issuance of an injunction restraining the mayor and city controller from approving said warrants and the city treasurer from paying any warrant drawn for the payment of wages under said ordinance. Preliminary objections were filed to said bill. At a pre-trial conference all facts stated in the bill were admitted. Conclusions of law were denied. After a hearing, the court below issued the restraining order complained of.

Appellants contend (1) that the ordinance is not an appropriation ordinance but a transfer ordinance, authorized by the Act of 1901, P.L. 20, 53 P.S. § 8825; and (2) that council has the power, under the Act of 1911, P.L. 461, 53 P.S. § 9495, to determine, in its discretion, the salaries of all city officials and employees who are not elected. Appellees contend that council is prohibited by various statutes from enacting the ordinance in question, and challenge the legality of the method pursued in enacting said ordinance as well as its unconstitutionality (sic). . .

An appropriation is the setting apart and establishing out of the general resources of the municipality, created largely by taxation, a certain fund for a particular purpose. See McQuillin, Municipal Corporations, Section 2346; 42 Am.Jur. 43. The lawful transfer of money from one fund to another is not an appropriation: City of Chicago v. Berger, 100 Ill.App. 158. There is an entirely new obligation created by the ordinance in question and

an appropriation of funds for the payment thereof; not merely the transfer of funds from one department to another. Had the items of appropriation, made in the general budget ordinance, been transferred and no appropriation made, an entirely different situation would be presented. Cf. Bailey v. Philadelphia, 167 Pa. 569, 574, 31 A. 925, 46 Am.St.Rep. 691. Assuming, however, that no appropriation had been made for the increase in salaries authorized by the ordinance in question, appellants could not enforce payment of such increase for it is too well established to admit of argument that without an appropriation there can be no payment of salaries: Thiel v. Philadelphia, 245 Pa. 406, 408, 91 A. 490. Clearly this is an appropriation ordinance; council did not intend it to be a transfer ordinance. In Raton Waterworks Co. v. Town of Raton, 9 N.M. 70, 49 P. 898, a New Mexico statute provided that an ordinance making appropriations for the ensuing year should be enacted within the last quarter of the year. A general appropriation ordinance was enacted in accordance with the statute. Subsequent thereto, council enacted a second ordinance, increasing the appropriations in certain respects. The court, in holding that the ordinance, passed after the beginning of the year and increasing the regular appropriation, was void insofar as the increases were concerned, said (page 908 of 49 P.): "Trustees of defendant town corporation had no authority to enact and enforce Ordinance No. 64 . . . so as to in any manner change or affect the appropriations then existing for that fiscal year." "... if an annual appropriation ordinance is required by statute . . . for the ensuing year, such ordinance cannot be changed, after the beginning of such fiscal year, by an ordinance changing appropriations": McQuillin, op. cit. supra, Section 2349, p. 989.

Appellants argue, however, that the Act of 1901, P.L. 20, as amended by the Act of 1911, P.L. 461, 53 P.S. § 9495, expressly confers upon council the discretionary power to determine the salaries of all employees who are not elected. This act provides: "They [council] shall also have power to fix, from time to time, the salaries of all city officials and employés who are not elected." This statute cannot operate to nullify the legislative mandate of the Act of 1901, supra, that all appropriations shall be made annually by general ordinance prior to the first Tuesday of February. These two statutes must be read together. The legislature in enacting regulatory statutes intends a reasonable and just grant of power, not a power to be exercised arbitrarily, indiscriminately, and without regard to the interests of those for whom benefits were intended. Provision has been made by the legislature requiring publication of the intended annual appropriation ordinance to enable the public to express its approval or disapproval of contemplated disbursements.

Failure to construe "from time to time" with reference to the legislative mandate that all appropriations shall be made annually would enable city council to manipulate salaries as they might desire. No blueprint of expenditures would be assured of reasonable effectiveness. Any surplus accruing from whatever source, could be expended immediately to increase salaries. Conceivably no surplus would be preserved and applied to the budget for the ensuing year. Reduction of taxes would become a mere possibility. The construction contended for by appellant would tend most strongly to a loose and irresponsible fiscal policy and would open the doors to fraud and partisanship. The selection of 114 employees from a total of more than 900 employed by the City of Scranton, for a salary increase would inevitably result in confusion and dissatisfaction and tend to disrupt and destroy efficient service to the municipality. An intention to create such an undesirable situation will not be attributed to the legislature. We are of opinion that the legislature intended "from time to time" to refer to the enactment of the annual appropriation ordinance. Council must, therefore, make provision in such ordinance for all increases in salaries which it might deem necessary and proper. It does not have power to fix salaries from week to week, month to month, or at any other time during the fiscal year after the enactment of a general appropriation ordinance.

The decree of the court below is affirmed. Costs to be paid by appellants.

MURPHY v. TOWN OF WEST NEW YORK

Supreme Court of New Jersey, 1945. 132 N.J.L. 595, 42 A.2d 5.

HEHER, JUSTICE. On August 12, 1942, the Board of Commissioners of the defendant municipality adopted a resolution declaring that an "emergency has arisen with respect to litigation in connection with funds on deposit in the closed New Jersey Title Guarantee and Trust Company," for which "no adequate provision" had been made in the current budget, and providing for an "emergency appropriation" of \$10,000, "pursuant to R. S. 40:2-31(1)." This action was set aside on certiorari on the ground that there was, in fact, no emergency within the purview of the statute; and there was also a direction that certiorari issue to review a resolution adopted by the local governing body on October 5, 1942, authorizing the payment of \$7,500 to the defendant Glauberman, from the money so appropriated, as "a retainer as special counsel" to the municipality in the matter adverted to, and also a contract made with him for such services. Murphy v. West New York, 130 N.J.L. 341, 32 A.2d 850. This latter resolution

was also set aside as a corollary of the judgment vacating the appropriation; but there was no ruling as to the validity of the contract. 130 N.J.L. 569, 34 A.2d 78.

A reargument was had on the prosecutor's motion. He seeks an adjudication that the contract itself is invalid in toto as in contravention of R.S. 40:2–29 and 40:50–6 N.J.S.A. Challenging this contention, the defendant Glauberman also urges a re-examination of the question of the validity of the resolution authorizing the payment of the "retainer" of \$7,500. It is argued that, since the retainer has been paid to Glauberman, the question is now moot, and that the payment was not, in point of fact, made from money raised under the resolution in question, but from the town's "current account fund," and there was, moreover, an appropriation of \$9.700 for "Special Services" in the 1942 budget. and therefore the payment was not made in violation of the statutes invoked. The cases of State (Hoxsey, Prosecutor) v. Mayor. etc., of City of Paterson, 40 N.J.L. 186; Heston v. Atlantic City, 93 N.J.L. 317, 107 A. 820; and Sleight v. Board of Education of Paterson, 112 N.J.L. 422, 170 A. 598, are cited in support of this position.

But the town's comptroller testified, without contradiction, that there was no "appropriation sufficient to cover the payment" at issue "in the year 1942," except that made by the "emergency resolution" of October (August?) 12th. If this was not so, why was it deemed necessary to use the emergency authority conferred by R.S. 40:2–31?

R.S. 40:2-1 et seg., N.J.S.A. regulates "county and municipal" budgets. Section 40:2-29 ordains that, "Except as may be otherwise provided in section 40:2-31. . . . no officer, board, body or commission shall, during any fiscal year, expend any money (except to pay notes, bonds, or interest thereon), incur any liability. or enter into any contract which by its terms involves the expenditure of money: a. For any purpose for which no appropriation is provided in the budget or by temporary appropriation pursuant to section 40:2-12 . . ., or b. In excess of the amount appropriated for any such purpose"; and that "Any contract, oral or written, made in violation hereof shall be null and void as to the county or municipality, and no moneys shall be paid thereon." The making of contracts and the expenditure of money for "capital projects to be financed in whole or in part by the issuance of notes, or bonds," and the making of contracts of lease or for services for a period exceeding the fiscal year in which such contract is made, "when otherwise provided by law", are excluded from this prohibition. Concededly, section 40:2–12 has no application.

These are peremptory legislative mandates designed to incorporate sound business principles and practices into the fabric of the local economy, with particular reference to the avoidance of waste, extravagance and ill-considered spending, and thus to safeguard the interests of those laden with the tax burden and otherwise to serve the common good; and it is axiomatic that they cannot be evaded by any pretense or device whatsoever. Frank Grad & Son, Inc. v. Newark, 118 N.J.L. 376, 193 A. 177. Though not an insurance against local maladministration, action by ordinance is a reflective process that also affords an opportunity for the expression of public opinion; and this is manifestly the rationale of the statutory provisions under consideration. Vide R.S. 40:49–1 et seq., N.J.S.A.

It does not matter that here the "emergency note," authorized by the resolution passed in the purported exercise of the power granted by section 40:2–31, supra, was not in fact issued, and that the payment was made from "current funds" on hand. There was no appropriation of the money in compliance with the statutory command. The "Special Services Account" covered other anticipated expenditures; and, moreover, the account was far from sufficient to cover the payment. The local comptroller testified that, while the payment to Glauberman was made from "current funds," the note was held in reserve in the event that it became necessary to replenish the "current account". The latter he termed "the title given to the entire budget." He said that the procedure was "merely a matter of financing."

The case of Heston v. Atlantic City, supra [93 N.J.L. 317, 107 A. 821], is not to the contrary. There, the expenditure was made in the performance of a mandatory duty laid upon the governing body to have the annual audit of the city's books and accounts made by "competent accountants," and to publish the result of the examination; and the city's "contingent fund" was drawn upon for the payment of accountants for services rendered in the performance of the statutory direction. There was a reservation of the question of whether "such a fund may be utilized for every obligation not otherwise provided for." Mr. Justice Minturn said: "It is enough for the purposes of this discussion to determine that, since the legislative requirement of publication of the financial status of the city was mandatory and imperative in character, the absence of a specific appropriation could not operate to defeat its execution, otherwise a well-defined legislative policy, presumably devised for the information of the citizen, as a basis for intelligent consideration in the direction of municipal affairs, could be effectually thwarted and subverted by studied inactivity, by a body possessing the peculiar threefold function of appropriating, legislating, and disbursing under a legislative conception of concentrated responsibility." He continued: "It is also to be observed that the passage of the resolution required no immediate financial outlay, but that payment was to be 'on the completion of such audit,' which in fact happened after September 1, 1918, at which time a specific appropriation for the purpose was in existence, and the necessity of resorting to the contingent fund was thereby obviated." He marked the distinction between cases in which "the duty to audit and publish the result was mandatory," and "the local body was simply a legislative instrumentality in its execution," and those in which "the work undertaken by the municipal body . . . was entirely of a discretionary character, and in nowise imperative as a delegated legislative duty." . . .

Section 40:2–29, supra, renders "null and void" (as to the county or municipality) a contract made in violation of its terms. The contract here is plainly in that category.

Invoking the principle of the case of Viracola v. Commissioner of City of Long Branch, 1 N.J.Misc. 200, 142 A. 252, it is contended that the contract did not impose "any obligation to be paid in the year 1942;" that the town "would not have been in default and would not have breached the contract had it made no payment" in that year; and that the contract "does not call for the expenditure of any money in the year 1942; it only calls for a promise to pay when convenient." This is obviously not so.

The contract engaged Glauberman "to act as special counsel to associate with the Town Attorney . . . in the prosecution" of a pending suit in chancery to enforce the Town's claim to a preference in the payment of its deposit in the defunct trust company: and the town undertook to pay Glauberman 9% of the money recovered, but not less than \$7500, "if there is a recovery." and to pay him "as soon as conveniently possible after the execution of this agreement, the sum of \$7,500 as and for a retainer, which retainer shall be considered payment in full for services rendered if and in the event there is a failure of recovery," and "shall be applied in part payment to any amount which may be due" to Glauberman under the contract, in the event of a recovery. Glauberman undertook "to diligently prosecute said claim to the best of his professional ability, to its final disposition." The contract was made on September 22, 1942; and the plain meaning of these provisions is that the Town would pay the "retainer" within the fiscal year. The parties themselves so construed the stipulation. As stated, the resolution authorizing the payment was adopted on the ensuing October 5th, and the "retainer" was paid the same day. Glauberman was retained because of what the governing body conceived was protracted delay in the prosecution of the suit; and the parties contemplated prompt and diligent action. The term "retainer" is here used in the sense

of a fee paid to counsel to insure his future services, as well as compensation for the services thus to be rendered. It was an inducement to Glauberman to undertake the service prescribed by the contract.

And there is manifestly no force to the contention, lastly made, that the invalidation of the contract "would be detrimental to the public interest and would result in a private injustice." E contra, it would be a disservice to the public interest were such a disregard of the letter and spirit of the statute to be countenanced. The statute declares the consequences of a violation of the public policy therein laid down; and it must be enforced as written. Private interests yield to the legislative policy.

The contract under review, and the resolution directing the payment of the "retainer" therein provided, are accordingly set aside, with costs.

Jersey City spent money to finance an advertising campaign in opposition to proposed constitutional amendments, which would affect the taxation of railroad property in the state. The expenditure was charged to an appropriation for "Railroad Tax Litigation." In brief, the background of that item was important litigation between the state and certain railroads over railroad property taxes, in which the city had an interest and which was still pending. The Court of Errors and Appeals held, in an eight-to-four decision, "that a municipality may lawfully publicize, at public expense, what its governing body conceives to be sound reasons, relating to the essential local welfare, for the rejection by the people of the State of proposed amendments to the Constitution" even though there was no express authority to expend money for such a purpose. It decided further, that the expenditure fell within the scope of the Railroad Tax Litigation item and, thus, was properly chargeable to it. City Affairs Committee of Jersey City v. Board of Commissioners of Jersey City. 134 N.J.L. 180, 46 A.2d 425 (1946). The case is criticized in 46 Col.L.Rev. 864 (1946) and 59 Harv.L.Rev. 1172 (1946).

SECTION 2. REVENUE

The purpose of this section is to present a general view of local revenue sources and problems and to consider in some detail the legal aspects of certain branches of the subject, such as special assessment financing, which are not developed in other law school courses.

What may generously be called the contemporary system of local revenue is, in fact, a complex patchwork wrought in a period marked by greatly expanded governmental activity at federal, state and local service levels. While the general property tax, with all its vagaries in policy and administration, remains the principal single producer of local revenue, service demands long since overreached it. To local demands has been added federal or state stimulation of local entry into or expanded local activity in this or that area of public service. The additional cost has had to be met in one way or another. In casting about for the needed funds local units have been guided more by expediency and political considerations than coherent revenue policy. Today we find local government, more especially the counties and municipalities, supported by a conglomeration of ad valorem property taxes, special assessments, capitation taxes, various excises such as license and retail sales taxes, service charges, income from enterprises, federal and state grants in aid, allocations of federal and state tax revenues, fines and penalties and even severance and income taxes. For the most part the effect is regressive; burden is not geared to ability to pay. See Alvin H. Hansen and Harvey S. Perloff, State and Local Finance in the National Economy, c. 3 (1944). High federal income taxes have undoubtedly been an important factor here. Nor is there close correlation between burden and benefit. If a city depends upon utility net revenues to keep taxes down the effect is to call upon the utility consumer to finance other services. There is another policy consideration which should be mentioned.

In the local revenue imbroglio there has been a definite trend toward financing local services with locally-shared federal and state revenues. Usually this involves no local responsibility for the imposition of the tax, the fruits of which are shared, and none for its administration. Is it desirable to leave local government without responsibility for the tax levies upon which it depends? The question strikes closer to the heart of genuine local autonomy than the presence vel non of conditions attached to federal or state grants-in-aid. It is evident that the grant-in-aid is more sensitive to need than the tax-sharing device; the latter may channel money into a local unit which already has adequate income. Yet, the grant-in-aid meets the objections as to local irresponsibility only to the extent that the local unit must put up funds of its own. A strong case has recently been made by an able student of local government for use of the tax supplement as a revenue tool calculated to rest responsibility on local shoulders for locally-shared state taxes. John F. Sly "Tax Supplements for Municipalities" 8 The Tax Review No. 2 (1947). If a state tax is of a type, which could reasonably and effectively

be employed as a separate local levy, a local governing body might be authorized to add a supplemental levy, within statutory limits, which would be collected by the state, along with its levy, and turned over to the local unit. Mr. Sly refers to tax supplement precedents in several states. After the Supreme Court of Missouri decided, in Carter Carburetor Corp. v. City of St. Louis, 356 Mo. 626, 203 S.W.2d 438 (1947), that the St. Louis "earnings tax" on the earnings in the city of both residents and non-residents was not authorized by a broad charter grant of power to impose taxes on all subjects of taxation for all general and special purposes, it was urged by some that the legislature authorize municipalities to add a supplemental levy to the state income tax. See "Permissive Taxation Versus State Subsidy" (Missouri Public Expenditure Survey, January 1948). The actual legislative answer was to give St. Louis (by H.B. No. 475, 64th Gen. Assembly, 1948) authority for two years to levy and collect an earnings tax of not to exceed one-half of one per cent. Pursuant to this authority the maximum levy has been imposed by the Board of Aldermen, effective September 1, 1948.

The shotgun approach to the local revenue problem is illustrated by Ohio practice. In Ohio use is made of a great variety of formulae in allocating various state revenues to local units. In most instances the formula is fixed by statute, but the local share of the sales tax is distributed in each county among the several units in the county by the county budget commission in accordance with a general standard of need of funds for operating expenses. Ohio Gen.Code § 5546-20 (Page, 1939); City of Columbus v. Budget Commission of Franklin County, 144 Ohio St. 437, 59 N.E.2d 367 (1945).

In 1946 New York adopted a relatively simple and direct plan of tax-sharing based upon population. N.Y. State Finance Law § 54. The stated objectives are to support local government and to reduce real estate taxes. The law makes provision for an annual state allocation of \$6.75 per capita to each city, \$3.55 per capita to each town, and \$3.00 per capita to each village. The local units are left free to spend the money as they think best.

Pennsylvania has taken a significantly different line. By an act of 1947 the state legislature granted broad power to the governing body of each local unit or various types and classes to impose and collect for general revenue purposes and as it might determine "taxes on persons, transactions, occupations, privileges, subjects and personal property within the limits of such political subdivision" which are not subject to a state tax or license fee. 53 Pa.Stats. § 2015.1 et seq. (Purdon, Supp.1947). The statute limits a local unit in the revenues it may collect

under the act to the equivalent of the revenue which would be produced by the maximum ad valorem levy.

A valuable post-war description of the sources of municipal revenue will be found in Hillhouse and associates, Where Cities Get Their Money (Mun. Finance Officers Ass'n, 1945). See also the Municipal Year Book 1948, 176–192 (Inter'l City Mgrs' Ass'n).

A. AD VALOREM AND OTHER GENERAL TAXES

Taxation is a subject of such dimensions and importance as to form the material for several law school courses. Nor is local taxation so peculiar as to preclude effective consideration in a general taxation course. It is not practicable, within the limitations of course time and book space, to deal with the subject here.

There are, however, aspects of local taxing power which should be considered. The taxing power of a state resides in its legislature but it may be devolved upon local government to finance lawful local objectives. Immemorial usage, as well as express constitutional provisions in some states, downs any question as to the validity of such devolution, IV Dillon, Mun.Corps. § 1375 (5th ed. 1911); Mo.Const. of 1945, Art. X, §§ 1 and 2(f). It is frequently said that local taxation depends upon an express grant of power. See People ex rel. Tolman v. Edward Hines Lumber Co., 385 Ill. 366, 52 N.E.2d 720 (1944). The power must be granted but clear implication is enough. Authority to tax to meet debt service on general obligation bonds has been implied from a grant of power to issue the bonds where there was no other means and nothing in the statute to deny the implication. United States v. New Orleans, 98 U.S. 381, 25 L.Ed. 225 (1878). In contemporary municipal finance, a matter of that importance is not left to implication.

Local taxation is governed by the general limitation, grounded in due process of law, that taxation be for a public purpose. It is subject to the further limitation that the object be a lawful purpose of the levying unit. See the materials set out at page 828 et seq., infra. See also Jersey City v. Zink, 133 N.J.L. 437, 44 A.2d 825 (1945), certiorari denied 326 U.S. 797, 66 S.Ct. 493 (1946).

ENGLISH v. SCHOOL DISTRICT OF ROBINSON TOWNSHIP

Supreme Court of Pennsylvania, 1947. 358 Pa. 45, 55 A.2d 803.

ALLEN M. STEARNE, JUSTICE. Plaintiffs, three individuals, filed this bill to restrain the respondent school district of Robinson Township from levying a tax on "coal mined by the open pit method commonly called the stripping method . . ." within the boundaries of the township. We were informed at the argument that such coal is not otherwise taxed locally or by the Commonwealth. Plaintiffs are lessees of coal lands producing coal by the stripping method in the township. The defendants, who were elected school directors, acting on behalf of the school district of Robinson Township, by resolution, imposed the tax on coal produced between August 27, 1947 and July 1, 1948. They did so pursuant to Act No. 481, passed at the last session of the legislature and approved by the Governor June 25, 1947, P.L. 1145, 53 P.S. § 2015.1 et seq.

At the outset, this Court is not concerned with the wisdom, need, or appropriateness of this legislation. Courts do not pass upon legislative wisdom but upon legislative power. Baldwin Township's Annexation, 305 Pa. 490, 496, 158 A. 272 (Maxey, J.); Olsen, Secretary of Labor of Nebraska, v. Nebraska ex rel. Western Reference & Bond Association, Inc., et al., 313 U.S. 236, 246, 61 S.Ct. 862, 85 L.Ed. 1305, 133 A.L.R. 500 (Douglas, J.).

Section 1 of the Act contains the following provision:

"The duly constituted authorities of cities of the second class, cities of the second class A, cities of the third class, boroughs, towns, townships of the first class, school districts of the second class, school districts of the third class and school districts of the fourth class shall have the authority, by ordinance or resolution, for general revenue purposes, to levy, assess and collect or provide for the levying, assessment and collection of such taxes on persons, transactions, occupations, privileges, subjects and personal property within the limits of such political subdivision, as it shall determine, except that such local authorities shall not have authority by virtue of this act to levy, assess and collect or provide for the levying, assessment and collection of any tax on a privilege, transaction, subject, occupation or personal property which is now or does hereafter become subject to a state tax or license fee; nor have authority to levy, assess or collect a tax on the gross receipts from utility service of any person or company whose rates and services are fixed and regulated by the Pennsylvania Public Utility Commission; nor have authority, except on sales of admission to places of amusement or on sales or other transfers of title or possession of property, to levy, assess or collect a tax on the privilege of employing such tangible property as is now or does hereafter become subject to a state tax."

The bill alleges the statute is repugnant to the constitution of Pennsylvania, P.S., alleging violations of Article I, sections 1 and 9; Article II, section 1; Article III, sections 3 and 7; Article IX, section 1, and section 1 of the Fourteenth Amendment of the federal constitution. These allegations may be summarized by saying that the title of the Act is inadequate and that the bill contains more than one subject; that there has been unlawful delegation of power; that taxation pursuant to the Act takes property without due process and also violates the uniformity requirement.

A number of parties were permitted to intervene at the argument, among them the City of Pittsburgh, a city of the second class, and a number of coal companies engaged in business in other municipal subdivisions of the state. The Attorney General appeared on behalf of the Commonwealth.

The statute in its presently important aspects resembles the Act of August 5, 1932, Ex.Sess., P.L. 45, 53 P.S. § 4613 et seq., commonly called the Sterling Act, authorizing the City of Philadelphia, as a city of the first class, to levy taxes. The Sterling Act and municipal action pursuant to it were sustained in Blauner's, Inc., et al. v. Philadelphia et al., 330 Pa. 342, 198 A. 889, 891. The opinion in that case, written by Mr. Justice Drew, finally disposes, adversely to plaintiffs' contention, of the objections made to Act No. 481 so far as the objections would relate to authority conferred on cities of the second class, cities of the second class A, and cities of the third class. The opinion stated: "It is admitted that the legislature has the right and power to delegate to the city council the authority by ordinance to levy, assess, and collect taxes for general revenue purposes. Such a delegation of the taxing power is expressly sanctioned by section 1 of article 15 of the Constitution of Pennsylvania, which provides in part that 'Cities . . . may be given the right and power to exercise the powers and authority of local self-government, subject, however, to such restrictions, limitations, and regulations, as may be imposed by the Legislature.' This court has ruled that the legislative taxing power may be lawfully delegated to an elective city council. A most recent case in point is that of Wilson et ux. v. Philadelphia School District et al., 328 Pa. 225, 195 A. 90, 113 A.L.R. 1401, in which Mr. Chief Justice Kephart reviewed the subject elaborately." See also Philadelphia v. Samuels, 338 Pa. 321, 12 A.2d 79. There remains for consideration, therefore, only the effect of the Act as to the other subdivisions of government affected by it.

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The issue now before us is of course limited to the power of the defendant school district and the resolution complained of. No facts are in dispute. The petition of the plaintiffs, pursuant to which we took the original jurisdiction, avers that "no material issues of fact will be raised, but the pleadings will raise exclusively issues of law. . . . " There seems to be some misapprehension on the part of some of the intervenors as to the scope of our inquiry. Generally, the form of the prayer of their petitions was "to intervene in the above proceeding and to appear and be heard by counsel and submit a printed brief and make oral argument at the hearing of said Bill of Complaint." The orders are substantially in the form that petitioner "is permitted to intervene in the above proceeding and to appear and be heard by counsel and submit a printed brief and make oral argument . ." But in a brief filed on behalf of intervenors it is argued that the ordinances described in the "petitions for leave to intervene violate the uniformity clause of Article IX, section 1." The orders granting leave to intervene for the purposes specified do not go so far as to put in issue in this case the validity of ordinances passed by political subdivisions other than the school district of Robinson Township, challenged by the plaintiffs. We cannot adjudicate the merits of other ordinances in the absence of the political subdivisions that passed them.

We must reject the objections complaining of what the plaintiffs call the delegation of power to the school district. Defendant school district's power is not unlimited. Section 1 contains the following provision: "The aggregate amount of taxes annually imposed by enactment of an ordinance or resolution by any political subdivision under this section shall not exceed an amount equal to the product obtained by multiplying the total assessed valuation of real estate in such political subdivision at the time of the said enactment by the maximum millage of tax thereon allowed by law." Section 32 of the Statutory Construction Act provides that the singular may include the plural: 1937, P.L. 1019, 46 P.S. § 532. It is really not so much a delegation of power to school districts as a direct assertion of the State's power to tax enforced by the State's agents: Minsinger v. Rau, 236 Pa. 327, 84 A, 902, Ann.Cas.1913E, 1324. The statute makes school districts bodies corporate: 24 P.S. § 30; Commonwealth v. Pittsburgh School District, 343 Pa. 394, 23 A.2d 496. The Constitution in Article X, section 1, provides: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this Commonwealth above the age of six years may be educated, and shall appropriate at least one million dollars each year for that purpose." In Minsinger v. Rau, supra [236 Pa. 327, 84 A. 903].

we dealt with the school district as "an agency of the commonwealth." See also Duff et al. v. Perry Township School District, 281 Pa. 87, 126 A. 202. The power to delegate to the elected school board as an agency of the Commonwealth the duty of levying taxes in order to comply with Article X, section 1, is not now open to question. It is sufficient to refer to what was said in Wilson et ux. v. Philadelphia School District et al., 328 Pa. 225, 195 A. 90, 113 A.L.R. 1401. At page 232 of 328 Pa., at page 95 of 195 A., we said: "It is no doubt true in this state that the Legislature has conferred upon school districts the power to levy and collect taxes for school purposes, and this has been upheld without reference to any definite restrictions placed thereon. Blair v. Boggs Tp. School Dist., 31 Pa. 274; Wharton v. School Directors, supra; Mellor v. City of Pittsburgh, 201 Pa. 397, 50 A. 1011; Duff v. Perry Tp. School Dist., supra. Laws have been enacted for school districts to levy taxes for purposes other than public education. Weister v. Hade, 52 Pa. 474; Keasy v. Bricker, 60 Pa. 9: West Donegal Township v. Oldweiler, 55 Pa. 257. In none of these instances was the constitutional question of improper delegation of the taxing power raised; moreover, in all of them the directors of the school districts involved were elected by the people, and it is now too late to question the power of elective school boards to levy a tax. The first case that considered the question of delegation of taxing power was that of Minsinger v. Rau, supra. Prior to this decision, it had been taken for granted that the Legislature could empower the school district to levy taxes for educational purposes." See also Commonwealth of Pennsylvania, State Employes' Retirement System v. Dauphin County, 335 Pa. 177, 179, 6 A.2d 870.

We find no support for the objection that the statute is repugnant to the requirement that all taxes shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax and shall be levied and collected under general laws. The statute undoubtedly is general, effective, as it is, throughout the state excepting in cities of the first class, an exception permitted by the classification provision of the Constitution: Article III, section 34. The school district's resolution now before us is general in its provisions and is effective throughout the territorial limits of the school district. The mere fact, if it be a fact, that the plaintiffs are at the present time the only parties engaged in the business in question does not make the resolution less general; if a second miner started in the same business tomorrow his product would immediately be subject to the tax. It was suggested in the oral argument that if the tax in this school district were sustained and if coal produced in the same way in another taxing district in the state were not sub-

jected to the same tax there would be a lack of uniformity repugnant to the constitutional requirement. There is nothing in the record to support that argument because the requirement is that taxes in the same taxing district shall be uniform on the same class of subjects, not that the taxing districts of the state must get together and agree upon the same tax for their respective districts. Compare Moore v. Pittsburgh School District, 338 Pa. 466, pages 472, 473, 13 A.2d 29, 32, in which we said: "The Constitution does not say that taxes shall be uniform as to classes of municipal divisions of the State, but uniform territorially as the State is divided territorially into cities, counties, townships and school districts. We all know as a matter of fact that taxes are not uniform in the different school districts comprising a class and never have been. They are bound to be different because of varying local conditions. Under Minsinger v. Rau, there could have been a different tax in Philadelphia from that in Pittsburgh, the one could have been the maximum impost of 6 mills and the other the minimum of 5." See also Sugar Notch Borough, 192 Pa. 349, 357, 43 A. 985; Clouser v. Reading, 270 Pa. 92, 113 A. 188.

For the same reason the statute cannot be held repugnant to the prohibition against local or special legislation. Under Article III, section 34, adopted in 1923, school districts have been classified. The school boards of districts of the same class may tax at different rates without infringing the provision against local or special legislation: Moore v. Pittsburgh School District, 338 Pa. 466, 13 A.2d 29. This is further illustrated by decisions under the Act of 1874, P.L. 230, as amended by the Act of May 23, 1889. P.L. 277, classifying cities. In Clouser v. Reading City, 270 Pa. 92, 95, 113 A. 188, 189, we said: "The ordinance in question treats all the grocers in Reading alike, and the fact that other grocers in other municipal divisions of the state may be taxed differently. or not at all, makes no difference in legislating for the class of cities to which Reading belongs. The argument that the act in question is local, because some cities of the named class may tax grocers, while others of the class may not, was met and disposed of in Jermyn v. Fowler, 186 Pa. 595, 40 A. 972, wherein it was said, answering a like contention there made: 'But this difference is not radical or fundamental to the existence of the power: it relates only to the difference in the existing conditions in the different cities.' The same argument could be made against the levy of general taxation if the rates differed in the different cities as they do." See also Allentown v. Gross, 132 Pa. 319, 19 A. 269; Williamsport City v. Wenner, 172 Pa. 173, 33 A. 544.

We must also reject the suggestion based on Article I, sections 1 and 9, and on section 1 of the 14th Amendment, that plaintiffs'

property is taken without due process. There is no doubt of the state's right to tax, and, as the cases cited show, there is no doubt of the state's right to confer on the school district, as its agent, the power to levy and collect the tax. The courts are open to the taxable to challenge the tax, as the plaintiffs are doing in this suit. The fact that the right of appeal against the resolution or ordinance before the date at which it becomes effective provided for in section 3 of the statute is limited is immaterial; due process does not require such a privilege; indeed, if there were any basis for the argument of unconstitutionality based on this provision of the statute the result would be merely to strike it out of the act pursuant to the severability provision contained in Section 8. Due process is not wanting in this case because it has long been settled in this Commonwealth that a plaintiff may go into equity to restrain attempted taxation for want of power to tax: Dougherty, Trustee, v. Philadelphia et al., 314 Pa. 298, 301, 171 A. 583. In such circumstances there is no want of due process.

The bill is dismissed, costs to be paid by plaintiffs.

The American Municipal News for July 1948, vol. II, No. 11, p. 82, reports that 284 Pennsylvania local units, including 32 cities, 123 school districts, 14 towns and townships and 115 boroughs, had adopted 55 income taxes, 111 amusement taxes and 62 severance taxes. See Raymond E. Evleth, "A New Local Tax Policy in Pennsylvania" 52 Dick.L.Rev. 218 (1948), for additional statistics and a discussion of the Pennsylvania legislation.

The two new types of local levies with the greatest revenue possibilities are the sales tax and the income tax. In 1934 New York City pioneered in adopting a sales tax. New Orleans has since come to lean heavily upon it and now many smaller municipalities levy sales taxes. It is reported that over ninety California cities have sales taxes. American Municipal News, supra, at 87. The New York City tax has been the focus of much litigation, particularly with reference to interstate and foreign transactions. See esp. McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S.Ct. 388 (1940), and companion cases—familiar material to the student of Constitutional Law.

Philadelphia has had an income tax since 1940. It has repeatedly withstood attack in the courts. See Kiker v. City of Philadelphia, 346 Pa. 624, 31 A.2d 289 (1943), certiorari denied 320 U.S. 741, 64 S.Ct. 41 (1943); Dole v. City of Philadelphia, 337 Pa. 375, 11 A.2d 163, 767 (1940); City of Philadelphia v. Cline, 158 Pa.Super. 179, 44 A.2d 610 (1945), certiorari denied 328 U.S.

848, 66 S.Ct. 1120 (1946); and City of Philadelphia v. Westinghouse Electric & Mfg. Co., 53 Pa.D. & C. 343 (1945). The tax is a flat-rate levy, primarily on earnings, and the withholding device is used to effect collection at the source with respect to salaries and wages. A very significant feature is the application of the levy to income earned in the city by persons residing outside as well as to income of residents earned beyond the limits of the city. Several major Ohio municipalities, in the exercise of home rule powers, and St. Louis, with the aid of statute, have made use of this Philadelphia experience. See, for the Ohio constitutional background, C. Emory Glander and Addison E. Dewey, "Municipal Taxation—A Study of the Preemption Doctrine" 9 Ohio St.L.J. 72 (1948).

These recent developments should provoke reflection. It will be interesting to observe the effect of city taxation of commuters upon inter-local relations and upon metropolitan organization. One may well ask whether the occupation by local government of new fields of taxation will complicate and render more regressive a tax system already open to question on both counts.

B. SPECIAL ASSESSMENTS

A familiar method of financing local improvements is the special assessment. It is usually and properly classified as a form of taxation and, like general taxes, may be levied only for public purposes. While jurisdiction to impose general taxes is conventionally made out by reference to the general benefits of government extended by the taxing unit, a special assessment is based upon benefits in a more exacting sense. The tax is laid for a special purpose, which is calculated to benefit the property burdened to a degree not enjoyed by property not assessed.

The device is far from new. In English law and practice it goes back to the Sixteenth Century improvement commissioners. It was employed in colonial America. A statute of 1691 made provision for such financing by New York City. That and other early instances of legislation on the subject are noted in the leading case of People ex rel. Griffin v. Brooklyn, 4 N.Y. 419, 438 (1851).

Subject to such special constitutional limitations as may exist in particular states, it may be said that the choice between general taxation and special assessments to finance an improvement involving special benefits is entirely a matter of legislative discretion. Certainly the Federal Constitution does not hamper this freedom of choice. See Memphis and Charleston Railway Company v. Pace, 282 U.S. 241, 51 S.Ct. 108 (1931).

By reason of its distinctive character a special assessment is not considered to be affected by constitutional or statutory tax exemptions, rate limitations and requirements such as property taxation in proportion to value and uniformity and equality. See 5 McQuillin, Mun.Corps. § 2165 et seq. (Rev. vol. 1944), citing numerous cases.

Whether under any circumstances the power to impose special assessments may be implied is an academic inquiry. The power must, of course, be devolved by the state upon a local unit in one way or another; it certainly is not inherent. Public finance is too practical a matter to be rested upon implications of power. It is a practical necessity that there be enabling legislation making the basic grant of authority and laying down the primary procedural pattern. It is necessary, moreover, that there be power to construct a given improvement as well as authority to finance it. Financing is an ancillary matter; it is but a means of effectuating the object financed. It is, of course, much easier to imply an ancillary from a grant of a primary power than the converse. Tooke, "Construction and Operation of Municipal Powers" 7 Temp.L.Q. 267 (1933).

The special assessment method may be used for any public improvement as to which the special benefit theory is reasonably appropriate. While it has been used most commonly to finance street improvements, sewers, the laying of water lines, street lighting, drainage and irrigation those objects far from exhaust the possibilities. Thus, the device has recently been upheld in California as a means of financing public parking places for motor vehicles. Said Mr. Justice Traynor: "Merchants frequently acquire and operate private parking places to attract customers and vacate buildings when no parking place for customers is available. Parking places that tend to stabilize a business section, by making it readily accessible to trade, benefit the property in the vicinity." City of Whittier v. Dixon, 24 Cal.2d 664, 151 P.2d 57, 153 A.L.R. 956 (1944).

On the other hand, a viaduct designed to eliminate a grade crossing in a city where the Lincoln Highway crossed railroad tracks has been placed in the general improvement category. Hinman v. Temple, 133 Neb. 268, 274 N.W. 605, 111 A.L.R. 1217 (1937).

The special assessment status of public property has been briefly considered under the head of intergovernmental relations. See p. 138, supra). While state and local public property quite generally may be subjected to the burden of special assessments, enforcement by foreclosure of a lien might seriously affect public functions to which the property is devoted. The courts, accordingly, are no more disposed to uphold enforced sale than to per-

mit the levy of execution upon such property. The alternatives include ultimate enforcement of the lien when the public use of the property ends, general liability of the governmental unit to which the property belongs and direct resort to mandamus to compel provision for payment. For collections of cases see Notes 95 A.L.R. 1394 (1935), 150 A.L.R. 1394 (1944).

SUPERVISORS OF MANHEIM TOWNSHIP, LANCASTER COUNTY v. WORKMAN

Supreme Court of Pennsylvania, 1944. 350 Pa. 168, 38 A.2d 73.

STERN, JUSTICE. We allowed an appeal from the Superior Court in this case (154 Pa.Super. 146, 35 A.2d 747) in order that we might review its decision sustaining the constitutionality of Section 386, Clause 2, of the General Township Act of July 14, 1917, P.L. 840, as amended by the Act of April 27, 1927, P.L. 464, 53 P.S. § 16903.

This clause as amended provided that in townships of the second class the supervisors should have power "On the petition of the owners of a majority of the lineal feet frontage along any street, highway, or portion thereof . . within the township, to enter into contract, and shall contract, with electric, gas, or other lighting companies to light and illuminate (the) said streets and highways and other public places in said villages with electric light, gas light, or other illuminant. The township supervisors shall levy, for the maintenance of said lights, an annual tax upon all the property, including factories and places of business, abutting upon the said streets and highways . the district benefited thereby, based upon the assessment for county purposes. Such taxes shall be collected in the same . No such tax shall be levied manner as other taxes. against any farm land."

Charles E. Workman, appellant, is the owner of a lot of ground upon which is erected a two and a half story dwelling situate on the Lititz Pike in Manheim Township, Lancaster County. Manheim Township is a township of the second class. In pursuance of a petition of the owners of a majority of the lineal feet frontage for a distance of 11,950 feet along Lititz Pike the supervisors, on May 5, 1933, imposed for that year a street-light tax of three and a half mills upon that "district", which included appellant's lot. On December 30, 1936 a light-tax claim of \$11.03 was filed against his property, upon which there was subsequently issued a scire facias. A petition by appellant to strike off the lien proved

unsuccessful and as the result of a jury trial a judgment for \$16.-99 was obtained by plaintiffs.

Article IX, Section 1, of the Constitution, P.S., provides that "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." Obviously the tax under consideration was not uniform within the territorial limits of the township for it was imposed only upon the properties within the district specified. The justification for its validity is sought by plaintiffs in the well-known principle that the requirement of uniformity does not apply to assessments for the cost of local improvements. Hammett v. City of Philadelphia, 65 Pa. 146, 150, 151, 3 Am.Rep. 615; In re Washington Avenue, 69 Pa. 352, 360, 361. 8 Am.Rep. 255: Huidekoper v. City of Meadville, 83 Pa. 156; In re Saw-Mill Run Bridge, 85 Pa. 163, 166, 167; Michener v. City of Philadelphia, 118 Pa. 535, 12 A. 174; In re Grafius' Run, 31 Pa. Super. 638, 640, 641; City of Philadelphia v. United States Housing Corporation of Pennsylvania, 82 Pa.Super. 343, 347. While ordinarily a tax cannot be imposed solely upon persons residing or properties situated in a particular portion of the territory of the taxing authority, it is proper to make municipal assessments for local improvements; such assessments, although stated in Hammett v. City of Philadelphia, supra, to be a "species of taxation", are not really taxes but claims laid against properties specially benefited, being in the nature of an exaction from them of compensation for the presumed increase in their values resulting from the improvement. Special assessments have been levied in connection with the grading, curbing and paving of streets, the building of sewers and culverts and the laying of water-pipes; where the question has arisen, it has also generally been held that the construction of the poles, wires, conduits, lamps and other fixtures of an electric street-lighting system constitutes a local improvement for the cost of the erection of which special assessments may be levied under proper statutory authorization. Ewart v. Village of Western Springs, 180 Ill. 318, 322, 323, 54 N.E. 478, 479, 480; Ankeny v. City of Spokane, 92 Wash. 549, 558, 159 P. 806, 809, L.R.A.1917A, 1093; Swetland Building Co. v. Children's Home, 127 Or. 188, 194, 270 P. 927, 929; School District No. 1 v. City of Helena, 87 Mont. 300, 309, 287 P. 164, 167; Roberts v. City of Los Angeles, 7 Cal.2d 477, 490-492, 61 P.2d 323, 328, 329.

The weakness, however, of the contention that the street-light tax levied upon appellant's property may be sustained as a special assessment for a local improvement lies in the fact that it ignores the fundamental qualification established in Pennsylvania—whatever may be the law in other jurisdictions—[that the exemption

of such an assessment from the application of the uniformity provision of the Constitution relates only to an initial construction or installation of a permanent improvement and not to its continuing maintenance or operation; an assessment for special benefits may be imposed only once as to any given improvement. This limitation stems from the leading case of Hammett v. City of Philadelphia, 65 Pa. 146, at page 156, 3 Am.Rep. 615, where Mr. Justice Sharswood said: "But when a street is once opened and paved, thus assimilated with the rest of the City and made a part of it, all the particular benefits to the locality derived from the improvements have been received and enjoyed. Repairing streets is as much a part of the ordinary duties of the municipality—for the general good—as cleaning, watching and lighting. It would lead to monstrous injustice and inequality should such general expenses be provided for by local assessments." This and numerous cases which followed (for example, Appeal of the Protestant Orphan Asylum of Pittsburgh and Allegheny, 111 Pa. 135, 144, 3 A. 217, 219, 220; Erie's Appeal, 305 Pa. 134, 137, 157 A. 476, 477) have firmly established the doctrine that the maintenance of the streets of a municipality are for the benefit of the entire community and not merely of the abutting property owners. The furnishing of electric energy to a lighting system cannot therefore be made the basis of an annual or recurring tax levied on properties alleged to be specially benefited thereby.

There is but one theory upon which a street-light tax can be justified if not imposed generally upon the same class of subjects within the township, namely, as a reasonable charge for a product furnished, or additional service rendered, to particular persons or groups of persons within the township. The furnishing of light by a municipality is a function performed by it in its proprietary or quasi-private capacity, just as when it furnishes gas or water. or collects ashes, removes garbage, or operates and maintains sewers. Charges made in connection with such operations are based upon contract rather than taxation because those who consume the product or receive the service act in so doing voluntarily, either as individuals or as a neighborhood or "district" group, and thereby impliedly agree to pay the price of the product furnished or service rendered. Such charges are "simply charges for a commodity sold as any others sell commodities." Shirk v. Lancaster City, 313 Pa. 158, 173, 169 A. 557, 563, 90 A.L.R. 688; Hamilton's Appeal, 340 Pa. 17, 21, 16 A.2d 32, 34. But they must be reasonably proportional to the value of the product or service received, for, if imposed without due regard to that requirement, "the charge provided for by the ordinance is, in legal effect, undoubtedly a tax, and the obligation to pay it could be created only by the [township's] exercise of its general taxing power.

. . . As a tax it is palpably violative of our constitutional provision, requiring uniformity of taxation." Hamilton's Appeal, 340 Pa. 17, 24, 16 A.2d 32, 35, 36.

The street-light tax imposed in the present instance was not measured by the service rendered, for it was based "upon the assessment for county purposes". There is no necessary or even likely connection between a proper charge for the light furnished and the assessed valuations of the properties abutting on the highway. This was the very method of charging which was declared invalid, as regards sewer rentals, in Hamilton's Appeal, supra, and in Philadelphia's Petition, 343 Pa. 47, 21 A.2d 876, where it was held to constitute a tax rather than a service charge, and, as a tax, to lack the constitutional requirement of When a municipality supplies light to abutting uniformity. property owners it acts the same as a private corporation, and certainly a private corporation furnishing light could not charge for it according to the assessed valuations of the properties to which it was furnished. The accepted method employed in levying special assessments for street improvements such as paving and sewer installations is based upon the foot front rule, not upon the valuations of the abutting properties, and, since it is impossible in the case of street lighting to apportion to each property a charge measured by any exact quantity or degree of user, the nearest approach to a reasonable and just allocation is to adopt that rule and to impose a charge of a stipulated amount per foot of highway frontage. While ordinarily the foot front rule is not adapted to rural districts (Seely v. City of Pittsburgh, 82 Pa. 360, 22 Am.Rep. 760) it would be an entirely permissible, and indeed the only valid method to employ here, for according to the act under which this tax was imposed the lighting was authorized only in "villages", by which was presumably meant built-up sections, and farm lands were expressly and properly exempted from the tax. It may be fairly asserted that properties (other than farms) abutting on a highway receive the light from a streetlighting system in proportion to their respective frontages.

To summarize therefore,—the street-light tax levied upon appellant's property was not a general tax, it was not a justifiable special assessment, and it was not a valid charge for service rendered because not measured by the method essential to the validity of such a charge. It therefore constitutes a violation of Article IX, Section 1, of the Constitution, P. S. But it is unconstitutional also in another respect. According to the amendatory Act of April 27, 1927, P.L. 464, it was obligatory on the township supervisors to contract for the lighting when petitioned thereto by the owners of a majority of the lineal feet frontage along any portion of a street or highway within the township, and also

obligatory on them thereupon to levy a tax to maintain the lights. The action of the supervisors in furnishing the lighting and imposing the tax was therefore determined wholly by the will of an unspecified number of abutting property owners, who, by their vote, could thus subject non-assenting neighbors to the burden of the tax; indeed the Superior Court said (154 Pa.Super. at page 149, 35 A.2d at page 749) that "The supervisors were made merely the representatives of the abutting property owners in entering into such contract." The effects of such a system are here illustrated by the fact that of the 27,350 feet of Lititz Pike which are in Manheim Township the first 1,400 feet immediately north of the City of Lancaster were not taxed at all; the next 11,950 feet, which included appellant's property, were taxed three and a half mills; the next 6,520 feet were taxed two and a half mills; the remaining 7,480 feet were not taxed; on another road in the township there was a light tax for that same year of two and a half mills, and on certain other streets one of two mills. These variations resulted from different groups of property owners petitioning, or failing to petition, the supervisors to install lights in front of their properties. If (as under the present act of May 1. 1933. P.L. 103) the supervisors were merely empowered, instead of obliged, to install the lights and impose the tax, then, even though they acted in response to a petition by individual property owners, there could be no ground for objection, but where, as here. the tax is the automatic and inevitable result of action taken by a mere group of residents, the statutory provision establishing such a system is unconstitutional as delegating to private citizens the authority to establish the boundaries of a taxing district and to compel the imposition of a tax on the property owners therein. Moreover, as due process of law requires that one's property should not be taken under the guise of taxation unless the taxing power is exercised by government and not by private individuals. the provision in question is, in the respect indicated, violative of the Fourteenth Amendment of the Federal Constitution. Browning v. Hooper, 269 U.S. 396, 46 S.Ct. 141, 70 L.Ed. 330; State of Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210, 86 A.L.R. 654.

The judgment of the Superior Court affirming the judgment of the Court of Common Pleas of Lancaster County is reversed and judgment is here entered for defendant.¹

¹ The court's footnote is omitted.

The Pennsylvania doctrine that special assessments may be laid only to defray the original cost of an improvement, which was applied in the principal case, precludes the use of such financing not only for current operation and maintenance but also for the capital outlay involved in restoration or renewal. City of Harrisburg v. Segalbaum, 151 Pa. St. 172, 24 A. 1070 (1892). It applies to repaving, for example, whether the original paving was financed by special assessments or otherwise. In neither case is this required by conventional special assessment theory. It is not readily conceivable that particular landowners will be specially benefitted by the operation of a public facility as well as by its original construction? While the decisions are not uniform, there is substantial authority that street sprinkling and cleaning may be financed by special assessments. See collection of cases in 5 McQuillin, Mun.Corps. § 2184 (Rev. vol. 1944). Generally speaking, however, statutory authority for special assessment financing is confined to capital outlay. In the street paving cases the question has arisen whether it may validly be stipulated that the contractor guarantee maintenance for a stated period. If confined to making good on the original construction, as distinguished from repairs entailed by ordinary wear and tear, the guaranty may be considered a capital cost. See People ex rel. North v. Featherstonhaugh, 172 N.Y. 112, 64 N.E. 802 (1902); Note 72 A.L.R. 644 (1931). Section 170 of the Constitution of Virginia contains an unusual provision forbidding special assessments except for the construction or "for the use" of sewers. This has been interpreted to mean actual use, not availability for use. Southern Rv. Co. v. Richmond, 175 Va. 308, 8 S.E.2d 271 (1940).

The Pennsylvania view that, once an improvement has been made, restoration or renewal, as by repaving, cannot be financed by special assessment, has not been favored. As indicated in Holswade v. City of Huntington, 96 W.Va. 124, 122 S.E. 449 (1924), the prevailing opinion is that repaving may just as truly be a local improvement in the special assessment sense as original paving. Whether it be permanent improvements or permanent waves that we are talking about, the connotation of "permanent" employed is a highly relative one.

As indicated in Chapter 3 (see p. 209, supra), if the determination of what property is to be embraced in an improvement district or project is left to the voters, or to administrative officers, or the determination of particular benefits is left to administrative hands, procedural due process requires that the property owners affected be accorded notice and an opportunity to be heard. Under the statute involved in the Manheim case petitioning property owners determined, in effect, both that there would be a tax and what property would be taxed. This was considered

an unconstitutional delegation of governmental authority to private hands. Had the ultimate decision been left to the local governing body that infirmity would not have been present.

A legislative determination of what property is benefited or the amount or extent of benefits obviates notice and a hearing. This legislative power may be devolved upon a local governing body. Devolution is ordinarily a practical necessity in determining what property is benefited. The subject is hardly appropriate for consideration by the general legislative body even if it be not barred from acting by constitutional limitations on local and special legislation. The legislature may, however, as to particular benefits, lay down a general rule, such as the frontfoot rule for street paving, which may effectively be employed by local authorities. For a short time around the turn of the century there was doubt as to whether the legislature could dispense with the procedure of determining benefits to particular land, after opportunity for a hearing, consistently with due process of law. The doubt was provoked by Norwood v. Baker, 172 U.S. 269, 19 S.Ct. 187 (1898), a paving case in which the application of the front-foot rule to the property of the plaintiff was arbitrary as a substantive matter but in which the court went on to declare that special assessments in substantial excess of benefits constitute a deprivation of property without due process of law. This was thought to exact a particularized method of determining benefits, involving notice and an opportunity to be heard. As Judge Dillon has pointed out, earlier decisions had upheld legislative apportionment of burden without regard to whether benefit might be exceeded so long as the method of apportionment was deemed reasonable. IV Dillon, Mun.Corps. § 1436 (5th ed. 1911). It is only fair to observe, however, that the foundation case, Davidson v. New Orleans, 96 U.S. 97, 24 L.Ed. 616 (1877), was decided before the Supreme Court had really begun the fashioning of Fourteenth Amendment due process as we know it. In a series of cases decided in 1901, the court laid at rest the notion that notice and an opportunity to be heard were necessary. French v. Barber Asphalt Paving Co., 181 U.S. 324, 21 S.Ct. 625, and companion cases. Use of the front-foot rule in levying paving assessments was upheld although no hearing as to benefits was provided.

Any legislative rule governing apportionment of burden, which is deemed a reasonable method for the given type of improvement, whether the rule be based on frontage, valuation, area or other factor, consists with procedural due process. See Roberts v. Richland Irrigation District, 289 U.S. 71, 53 S.Ct. 519 (1933). Square footage, as well as frontage, has been used in apportioning street paving costs. Hagman v. City of New Orleans, 190 La.

796, 182 So. 753 (1938). Despite its general effectiveness, however, a legislative rule of apportionment may be so arbitrary as to particular property that its application to such property will not be upheld. This may be the case, for example, of the application of the front-foot rule in imposing a paving assessment upon an irregularly shaped lot, where the effect will be gross inequality of burden. But see Donaldson's Heirs v. City of New Orleans, 16 La. 1059, 118 So. 134 (1928).

We have been considering the type of assessment which is levied in full at one time (although provision may be made for installment payment) and imposes a separate lien upon each parcel of property affected. Quite different is the method of organizing an incorporated improvement district. While the theory of apportioning the burden may be benefits and the district may be created to make a specific improvement, as distinguished from general responsibility in a given area for a particular function, the levy is not uncommonly an annual ad valorem or acreage tax imposed to meet principal and interest requirements of bonds issued to finance the project. Due process is no obstacle here, even though burden may in fact exceed benefit. The situation is treated substantially like that where resort is had to ad valorem taxation to provide for debt service on general obligations of general function local units. If the going gets rough there may be a heavy cumulative burden upon the faithful taxpayer. Norris v. Montezuma Valley Irrigation District, 248 F. 369 (C.C.A. 8th, 1918), certiorari denied 248 U.S. 569, 39 S.Ct. 10 (1918).

It must not be assumed from the fact that a special assessment does not offend any Federal constitution limitation that it is consistent with the state constitution. In addition to pertinent special constitutional provisions in certain states it is to be noted that some state courts adhere to the Norwood v. Baker concept that a burden substantially exceeding benefit may not validly be imposed. See IV Dillon, Mun.Corps. § 1437 et seq. (5th ed. 1911); 5 McQuillin, Mun.Corps. § 2440 (Rev. vol. 1944); Note 56 A.L.R. 941 (1928).

Special Assessment Procedure

The procedure employed in special assessment financing varies so much from state to state, taxing unit to taxing unit and function to function that generalization is hazardous. To pin the matter down to the practical level governing legislation in a particular state must be consulted. A rough outline of the procedure which may be followed in a paving case, for example, may, however, afford a working idea of what takes place.

1. Action may be initiated by petition of property owners or by the local governing body. In either event, the ultimate decision to undertake the project and to finance it by special assessments will be that of the governing body.

- 2. The first formal step by the governing body is the adoption of a resolution of intention to make the improvement. The resolution will describe the proposed improvement at least in a general way.
- 3. Publication of notice of intention follows. It informs interested parties of the date set for hearing objections.
 - 4. Hearing.
- 5. If there are no objections or those advanced are rejected the governing body will determine by appropriate measure, usually a resolution, that the improvement shall be made and provide for the preparation of plans and specifications and for advertising for sealed bids.
 - 6. Notice to bidders is given by publication.
- 7. The contract is awarded to the lowest responsible bidder. There may be an additional requirement that the bidder be able to furnish satisfactory security and the governing body may have authority to reject all bids and readvertise or make a private award for an amount not greater than lowest bid received from a responsible bidder.
- 8. The contract is signed upon behalf of the local unit by the officers designated by the governing body. It is sometimes required that the form of the contracts be prescribed by resolution.
- 9. At this stage there may be very important variations. Under some statutes the appropriate officer (e.g., city engineer) is called upon at this point to make a report showing total project costs and the amount chargeable to each parcel of land subject to assessment (according to frontage or other governing rule of apportionment). His report is made the basis of an assessment ordinance. Quite commonly, on the other hand, the assessments are not levied until the work has been completed and accepted. Under either method it may be required that a hearing be conducted with a view to correction of errors, on valid objections made at the hearing, before final adoption of the assessment ordinance.
 - 10. The levy is certified to the proper officer for collection.
- 11. The property owner is usually accorded an option, available for a limited period, to pay his assessment in a lump sum or in annual installments over a period of years.
- 12. Collection of assessments may be anticipated, under appropriate enabling legislation, by the issuance of bonds or certificates of indebtedness. These obligations are of two principal types. The first is a general obligation of the local unit to be

met by general taxation to the extent that special assessment collections fail to cover debt service. The second is a special obligation payable solely from the assessments.

WERNINGER v. STEPHENSON

Supreme Court of Appeals of West Virginia, 1918. 82 W.Va. 367, 95 S.E. 1035.

Poffenbarger, P. This appeal is a continuation of the resistance to a bill for the enforcement of lien for paving assessments by the owner of the abutting property upon which they were made, on the ground of invalidity thereof by reason of a substantial departure from the contract between the city of Huntington and the contractor, in the performance thereof, or such nonperformance or defective performance as suffices to invalidate the assessments, notwithstanding the property owner's knowledge of the departure and confirmation of the assessment after notice, without objection on his part. The aggregate of the amounts of the assessments involved in this suit is not large, but numerous others, amounting in all to \$30,000 or \$35,000, are, it is said, resisted on the same grounds, wherefore very considerable amounts depend upon the result.

The paving was done under a charter clause providing for payment of the cost thereof by the abutting property owners, in five equal installments, evidenced by as many paving certificates bearing interest, and payable, respectively, in thirty days, one, two, three, and four years, and for sale of such certificates to the contractor doing the work or any other person. The amounts specified in the certificates are made liens on the assessed lands, lots or parts of lots, enforceable by suit in the name of the holders, and debts against the owners of the real estate, collectible in the manner provided by law for the collection of other debts. The contract out of which the certificates in question arose was made between the city and J. Ullom, who, being unable to finance the work, as it progressed obtained advancements from the plaintiff, Werninger, in the course of the performance of his contract, and assigned to him the certificates involved in this suit after issuance thereof.

Under the charter provisions, the power and authority of the city to grade and pave its avenues, streets, roads, and alleys are very broad. Without a petition therefor, it may order any of them to be improved, and assess the entire cost thereof, except that of intersections, against the land, lots, and fractional parts of lots fronting thereon; and, upon the petition of the owners of property constituting not less than half of the frontage upon any street, avenue, road, or alley, it may cause such improvement

to be made, and assess the entire cost to the abutting properties and their owners, and assume the certificates representing the cost of paving the intersections, or refund it, if it sees fit to do so. It may do the work itself, and its decision to perform it may be made without notice, or after publication of notice of its intention to let the work to contract and a request for bids, or after rejection of bids submitted. The board of commissioners are clothed with full power and discretion as to the character of the improvement to be made. They may pave with brick, wooden blocks, asphalt, or other suitable material or they may macadamize the streets, avenues, roads, or alleys, or otherwise permanently improve or repair the same. The only act required in the nature of a condition precedent is the passage of an ordinance or resolution by the board of commissioners, ordering the work to be done, and stating the method of payment, except in those instances in which the work is let to contract. When the board proposes to let it to contract, it is required to publish a notice calling for bids or proposals. In such case the city is required to approve and adopt plans and specifications of the work to be done before advertising for bids, which shall be referred to in the advertisement and the contract made. However the work is done, two methods of payment are provided for: (1) Out of the city treasury, with funds to be provided by a sale of bonds, if necessary; and (2) by the issuance of paving certificates. The only difference in the amounts of the assessments between an improvement made by the board upon its own initiation and one made upon the petition of property owners is the inclusion of the cost of paving intersections in the latter case, which the city may pay or refund or not, at its discretion.

In the absence of proof of fraud or bad faith, or such a radical and manifest departure of the work done from that ordered and contracted for as makes it substantially an improvement different in general character from the one contemplated, one not ordered nor contracted for, acceptance of the work by the city or other public corporation for which it is done is held, by the great weight of authority, to be final and conclusive. "In accordance with the theory already given as to the effect of the acceptance of work by the city or other public corporation, it has been said that, if the public corporation has accepted the work as being in proper performance of the contract under which the improvement has been constructed, the question of actual performance as a matter of fact is immaterial, if it cannot be shown that in accepting the work the proper officials were guilty of fraud or bad faith." Page & Jones, Taxation by Assessment, § 532. "It is held in some jurisdictions that if an improvement has been constructed to the satisfaction of the public authorities, and has been accepted by

them, defects in performance are no defense to the assessment, unless the improvement is a different one from that which was contracted for." Page & Jones, Taxation by Assessment, § 533. Cooley on Taxation asserts the same general rule and the exception thereto. 3d Ed. pp. 1280-1283. To review the decisions upon which the text is founded would involve an unnecessary consumption of time and labor.

It is sometimes difficult to distinguish between substantial performance accepted by the city and a departure amounting to the substitution of one improvement for another, which cannot be made binding by an acceptance; but it is obvious that the improvement for which these assessments were made does not depart from the one ordered in respect of location or general character. It is a street paved with brick of the kind and quality ordered and contracted for, as determined by a decided preponderance of the evidence. In respect of durability, utility, value, and convenience, it may fall somewhat short of the expectations of the owners of the abutting property, but as to this there is no preponderance against the finding of the trial court. There was a departure only in the matter of the material used in the base, and what was used could have been provided for in the contract and specifications. Believing it to be as good or better than that actually specified, the city authorities have accepted the work. Such departures do not invalidate. A five-inch gutter and curb may be accepted under a contract calling for six inches. Chicago v. Sherman, 212 Ill. 498, 72 N.E. 396. The use of less cement than is specified, a kind other than that specified, lime screenings in place of sand, and failure to plaster curb walls as required, do not invalidate. People v. Whidden, 191 Ill. 374, 61 N.E. 133, 56 L.R.A. 905. Although the cement used is inferior and the sidewalk two or three inches shorter than that provided for, and made of softer stone, the work is the same as that contracted for. Marshall v. People, 219 Ill. 99, 76 N.E. 70. A departure as to location or general character is fatal and incurable by acceptance. What is virtually a dirt road cannot be accepted under a contract calling for construction of macadam road. Gage v. People, 200 Ill. 432, 65 N.E. 1084; Id., 193 Ill. 316, 61 N.E. 1045. 56 L.R.A. 916. If the grade is changed so as greatly to increase the cost, the improvement is regarded as a new one. Eustace v. People, 213 Ill. 424, 72 N.E. 1089. These holdings suffice for illustration of the rule and its exception.

The notice and contract may have been intended to subserve and protect the interests of the owners of the assessed properties as well as those of the city and the general public, and such owners may have had the right to compel full compliance with its terms; but, if so, there is good reason for requiring timely exer-

cise thereof. The law vests authority in the city to raise funds by means of assessments against their property for the construction of a work by which they are pecuniarily benefited and in which they have a special or peculiar interest. If they may intervene, by injunction or otherwise, during the progress of the work, to prevent departures from the contract in minor respects. it does not follow that they may forego such right, remain passive and quiescent until the work has been completed at heavy expense, and then take the benefit of the improvement as made and refuse to pay their just proportions of the costs. Where such right of intervention is admitted and recognized, it must be exercised before confirmation of the assessment or not at all. People v. Whidden, 191 Ill. 374, 61 N.E. 133, 56 L.R.A. 905; Fisher v. People, 157 Ill. 85, 41 N.E. 615; People v. Green, 158 Ill. 594, 42 N.E. 163. The right to intervene while the work is in progress affords them ample protection, and to permit them to avoid the assessments after completion and acceptance would result in great injustice to taxpayers and unfairness to the authorities charged with the execution of the city's powers as well as the contractors. Here there is not the slightest evidence of any fraud or lack of good faith on the part of the commissioners or the contractor, and the work done is substantially the same as that contracted for.

The objection that two lots were assessed jointly is untenable. Nothing in the charter requires separate assessment of adjacent lots owned by the same person, and the court cannot read such a requirement into it. Hager v. Melton, 66 W.Va. 62, 73, 66 S.E. 13.

Nor was it beyond legislative authority to make the assessments personal debts against the owners of the properties assessed. St. Mary's v. Locke, 73 W.Va. 30, 80 S.E. 841.

For the reasons stated, the decree complained of will be affirmed.

The usual sanction for the enforcement of special assessments is a lien upon the property benefited, which may or may not be superior to ordinary encumbrances and on a parity with ad valorem tax liens, depending upon the legislation of the given jurisdiction, and which is subject to foreclosure upon default in payment of the assessment. Numerous authorities are cited in 5 McQuillin, Mun.Corps. § 2262 (Rev. vol. 1944). "About half of the States permit of the issuance of obligations payable solely out of special assessments, but permit later assessments to be levied against the same properties, the lien of which takes priority over the lien of prior assessments." David M. Wood, "Erie

Railroad & Tompkins: Significance of U. S. Supreme Court Ruling to Municipal Bondholders" 136 The Daily Bond Buyer 1174 (1942).

Whether the owner may be subjected to personal liability is another matter. In principle, the position taken by the West Virginia Court appears sound as to resident owners. Ultimately and practically all taxes are imposed on people, not things. If an assessment is validly apportioned and laid in the first instance, there would appear to be no departure from special assessment theory in providing for personal liability as one means of enforcement; under such circumstances the benefit has been received and the owner is merely being held accountable generally to pay for it. This view is supported by Davidson v. New Orleans, 96 U.S. 97, 24 L.Ed. 616 (1878). The state decisions, however, are at odds on the question. See Note 127 A.L.R. 551 (1940).

In Dewey v. Des Moines, 173 U.S. 193, 19 S.Ct. 379 (1899), an attempt to render a non-resident owner personally liable for an assessment was nullified. Actually, there was no provision for personal service and none made upon the non-resident but the court declared broadly that the state lacked legislative power to provide for personal liability. Nickey v. Mississippi, 292 U.S. 393, 54 S.Ct. 743 (1934), permitted resort to property other than that taxed to enforce collection of a non-resident's ad valorem taxes. Were the question presented today it is not unlikely that the court would uphold a rule of personal liability, if, of course, personal jurisdiction of the non-resident were obtained in the enforcement proceeding. See Rubin, "Collection of Delinquent Real Property Taxes by Action in Personam" 3 Law and Contemp.Prob. 410, 422 (1936).

Not uncommonly a special assessment statute gives the property owner the option of paying the full amount of his assessment within a brief period, such as thirty days, or of electing in writing within that period to pay in installments over a period of years. The question has arisen whether the municipality may elect the installment plan where the property owner does nothing during his option period. An affirmative answer was given in City of Salisbury v. Arey, 224 N.C. 260, 29 S.E.2d 894 (1944). Pertinent paragraphs of the opinion of Judge Denny, for the court, follow.

"On the first question the appellants contend that in the absence of a written request from the property owner to be permitted to pay the assessment in installments, the City had no authority to divide the assessment into installments, but was limited to a foreclosure proceedings for the collection of the entire amount, which proceedings could have been instituted at

any time within ten years after the expiration of thirty days from the confirmation of the assessment roll on 6 April, 1926. and rely upon the following authorities: City of Lexington v. Crosthwait, 78 S.W. 1130, 25 Ky.Law Rep. 1898; City of Lexington v. Woolfolk, 138 Ky. 392, 128 S.W. 104; Hubbell Son & Co. v. Hammill, 187 Iowa 1083, 175 N.W. 41; Schaefer v. Hines. 56 Ind.App. 17, 102 N.E. 838; Cleveland v. Spartanburg, 185 S.C. 373, 194 S.E. 128; and Blake v. Spartanburg, 185 S.C. 398, 194 S.E. 124, 114 A.L.R. 395. An examination, however, of these authorities, discloses that in each case an agreement between the City and the land owner was required, either by statute or by the ordinance authorizing the local improvements, before the City could divide the assessment into installments. There is no such requirement in our statute or in the preliminary resolution authorizing the local improvements for which the original assessment involved herein was levied. The statute requires the preliminary resolution to designate the terms and manner of the payment. G.S. § 160-83, C.S. § 2708; and the resolution provided: That the owners of the abutting property affected hereby shall pay the amount assessed against their property in cash upon completion of the work and confirmation of the assessment roll, as provided in said article (Sec. 6, Chap. 56 Public Laws of 1915, G.S. § 160-83, C.S. § 2708), or in ten equal annual installments bearing interest at the rate of 6% per annum from the date of the confirmation of the assessment roll.

"The pertinent part of G.S. § 160-91, C.S. § 2716, is as follows: The property owner or railroad or street railway company hereinbefore mentioned shall have the option and privilege of paying for the improvements hereinbefore provided for in cash, or if they should so elect and give notice of the fact in writing to the municipality within thirty days after the notice mentioned in next succeeding section, they shall have the option and privilege of paying the assessments in not less than five nor more than ten equal annual installments as may have been determined by the governing body in the original resolution authorizing such improvement. * * The whole assessment may be paid at the time of paying any installment by payment of the principal and all interest accrued to that date.

"We think the foregoing provisions in the above statute were enacted for the benefit of the property owner, giving the owner a period of thirty days from the date notice is given as required by G.S. § 160-92, C.S. § 2717, in which to pay the assessment in cash, without interest; or, if he should so elect and give notice in writing to the municipality within said period of thirty days, that he desires to pay his assessment in installments, then it becomes mandatory upon the City to permit such property own-

er to pay his assessment in installments. But, where the property owner remains silent and neither pays in cash within the thirty-day period nor signifies in writing his election to pay in installments, the option passes to the municipality to proceed to foreclose and collect the entire assessment or to collect the assessment in installments, as provided in the original resolution authorizing the improvements.

"Upon the facts presented on this record, the governing body of the City of Salisbury had the same right to waive the failure of the property owner to pay the assessment in cash and to collect the assessment in installments in accordance with the terms and provisions of the resolution authorizing the improvements, that it has to waive the acceleration provision contained in the same statute in cases of default, which provision is as follows: In case of the failure or neglect of any property owner to pay any installment when the same shall become due and payable, then and in that event all of the installments remaining unpaid shall at once become due and payable and such property . . . shall be sold by the municipality under the same rules, regulations, rights of redemption and savings as are now prescribed by law for the sale of land for unpaid taxes. G.S. § 160-91, C.S. § 2716. Our Court has held that the above acceleration provision was enacted for the benefit of the municipality and may be waived without starting the running of the statute of limitations as to unmatured installments. Town of Farmville v. Paylor, 208 N.C. 106, 179 S.E. 459, which decision is in accord with the following decisions from other jurisdictions: Town of Cheraw v. Turnage, 184 S.C. 76, 191 S.E. 831; Mayor and Aldermen of the Town of Morristown v. Davis, 172 Tenn. 159, 110 S.W.2d 337, 113 A.L.R. 1164; City of Jackson v. Willett, 178 Tenn. 605, 162 S.W.2d 367; Barber Asphalt Paving Co. v. Meservey, 103 Mo.App. 186, 77 S.W. 137; Voorhees v. North Wildwood, 75 N.J.L. 463, 68 A. 175; City of Middlesboro v. Terrell, 259 Ky. 47, 81 S.W.2d 865.

"In the case of City of Jackson v. Willett, supra [178 Tenn. 605, 162 S.W.2d 369], the Supreme Court of Tennessee was considering the identical question we have under consideration, except the City of Jackson was under no obligation to grant the property owner the privilege of paying on the installment plan unless and until the property owner agreed in writing not to contest the debt. The Court held that: The municipality had the right by virtue of this provision to refuse to grant to the taxpayer the 'privilege' of the installment plan of payment, unless and until the written agreement not to contest the debt had been entered into, and upon the failure or default of the taxpayer in this regard, the city had the right to demand and col-

lect the payment in cash. But, just as with the acceleration clause, the provision was obviously for the benefit of the city, to be exercised or waived at its option. We can find no reason for applying the rule to the provision for acceleration, which does not call for its application to the provision under consideration. The principle involved is the same. In both cases the taxpayer seeks to penalize the city for its indulgence; in the one case for its failure to mature the entire debt by enforcement of the statutory acceleration provision, and in the other for its failure to enforce payment of the entire debt in cash under the pertinent statutory provision. Likewise, in the case of City of Norman v. Allen, 47 Okl. 74, 147 P. 1002, it was held and approved in City of Norman et al. v. Van Camp et al., 87 Okl. 182, 209 P. 925, 927, that where the ordinance provides that the property owners may, within 30 days from the passage thereof, have the privilege of paying all assessments without interest, and if such property owners do not avail themselves of such privilege, their assessments and installments thereof shall draw interest from the date of the passage of the assessing ordinance, and the interest on the whole or entire unpaid installments and assessments then be payable annually at the time the respective installments under the assessments are payable."

C. Services Charges

A very poorly conceived constitutional amendment, which imposed drastic limitations on property tax levies, was adopted in West Virginia in 1932. The idea was to curb expenditure; scant thought was given to how governmental services, which had been the responsibility of the local units, dependent upon ad valorem taxation, would thenceforth be financed. was a fiscal crisis of the first magnitude, which was met only by wholesale state resort to indirect taxation, notably a sweeping privilege tax measured by gross income, and by the state either taking over or subsidizing important public responsibilities such as schools and secondary roads. See John F. Sly and George A. Shipman, "Tax Limitation in West Virginia" in Property Tax Limitation Laws 77 et seg. (Pub.Admin.Serv. No. 36. 1934). While these measures meant much to the counties they did not relieve the municipalities. An interesting attack upon their financial problem was made by a statute enabling them to make service charges not only for services like sewage disposal and garbage collection but also for old-line, tax-supported services like fire and police protection. The case which follows involved recourse to that statute.

McCOY v. CITY OF SISTERSVILLE

Supreme Court of Appeals of West Virginia, 1938. 120 W.Va. 471, 199 S.E. 260.

Fox, Judge. The City of Sistersville, operating under a special charter, adopted an ordinance in the year 1933, which was readopted in 1934 and 1935, imposing rates, fees, and rentals for certain essential or special services under the alleged authority of chapter 27, Acts of the Legislature, First Extra. Session 1933, amending Code 1931, 8-4-20. J. Hanford McCoy, a resident, property owner, and taxpayer of the city, filed his suit in the circuit court of Tyler county, attacking the legality of the assessment against him under the said ordinances, and sought and obtained a temporary injunction against the enforcement thereof. The city interposed its demurrer to the bill filed in said suit, which the court overruled, and the questions arising thereon have been certified to this court.

The ordinances in question provide for the assessment of rates, fees, and rentals for five essential or special services; (1) Fire protection; (2) street lighting; (3) sanitary sewerage; (4) garbage collection; and (5) street cleaning. As to street-cleaning services, no assessment was made for the fiscal years 1933–34 and 1934–35, but was made for the year 1935–36, and, as to the other services named, assessments were made for each of the fiscal years beginning on the first day of July, 1933, 1934 and 1935. Assessments were likewise made for the fiscal year 1936–37, but no ordinance therefor having been adopted by the city, the right to collect the same is not now insisted on.

It will be noted that the asserted right to collect the assessments made under said ordinances depends wholly upon the statute referred to, and the extent to which the powers therein granted to municipalities of a certain class may be exercised under section 1. article 10, of the Constitution, as amended, see Acts 1932, Ex. Sess., c. 9, commonly known as the tax limitation amendment. and section 9 of said article. The provision of the act relied on is here quoted: "Whenever in the judgment of the municipal authority of any municipal corporation organized under special charter in this state the public health, safety, comfort and/or well being demands the continuance, maintenance, installation or improvement of any essential or special service, including police and fire protection, street lighting, sewerage and sewage disposal, garbage collection and disposal, street cleaning, and the public revenues of such municipality are not sufficient for the purpose, the municipal authority may by proper ordinance provide for the continuance, maintenance, installation and/or improvement of such special service, together with suitable regulations governing such service, and may impose upon the users of such special service such rates, fees and rentals as are necessary to pay the cost of such special service, and may provide for the collection of such rates, fees and rentals in the same manner as municipal taxes are collected, or otherwise, as the municipal authority shall elect, and may provide penalties for any violation of such ordinance."

The purpose of the act, to provide a way by which "essential or special service," including fire protection, street lighting, sewerage, garbage collecting, and street cleaning, may be maintained, is clear; and the right of the Legislature to authorize the assessment of rates, fees, and rentals to provide for the cost thereof. is not seriously disputed. The difficulty grows out of the methods employed by the city in seeking to avail itself of the benefits of the act. The act provides that the city may impose upon the users of such special services such rates, fees, and rentals as are necessary to pay the cost thereof. The position of the plaintiff. broadly stated, is that the assessment for the cost of these services is not imposed on the users thereof, but upon property, or confined to owners of property, and is, in effect, an additional tax on property, in violation of the tax limitation amendment, and the uniformity provision of section 9, article 10 of the Constitution. The city contends that the services provided for are special benefits to the property affected thereby, and that the fees, rates, and charges in question are not general taxation and may legally be imposed under the act above quoted.

The statute relied upon is constitutional. The Legislature had the power to clothe the municipality with authority to continue the essential or special services mentioned therein, and to impose assessments upon the users thereof to meet the costs of such services. The act being constitutional, it must, of course, be assumed that the Legislature meant to make it effective, and we will, therefore, give to the act such interpretation as will effectuate its purposes, and not add to the difficulties of its enforcement. We fully recognize the difficulties connected with the administration of a power of this character, and the impossibility of an exact equality of burden. With these views in mind, we have examined the ordinances with care, and find that as to each service for which an assessment of rates, fees or rental is imposed, the burden rests upon owners of property. No attempt is made to impose any burden on the users of such services as a class, except, of course. as to that class of users who are both owners of property and users of the services. Under the ordinances, such assessments are based (1) as to fire protection, upon the value of buildings and chattels; (2) as to street lighting, frontage of lots abutting on streets, alleys, and lighted ways; (3) as to sewerage service, the number of connections, the owner of the property being held responsible; (4) as to garbage collection, according to the number of households, and in this case, the owner of the household, not the occupier, is held liable; and (5) as to street cleaning, the frontage of lots abutting upon any specially cleaned street. The user of any service provided for, not a property owner, escapes any direct burden. Whether he will pay any part thereof by increased rent or otherwise is problematical, and insufficient as a basis for any statement that he pays any part of the cost of such services.

The theory that the rates, fees, and rentals in question were intended to apply to property especially benefited by the services provided for finds no support in the act on which the ordinances are based. That act does not rest the power therein granted upon the theory that the services provided for are public improvements resulting in special benefits to owners of property, but that the services are essential, and that the users, by methods other than general taxation, must pay the expense thereof. None of the services provided for is permanent in its nature, each depending on ordinances which may be renewed or abandoned, and, if abandoned, leave no added value to property of any kind. That they are services, the cost whereof is to be paid from funds derived from sources other than general taxation, is implied in the act itself, because it can only be made effective when "the public revenues of such municipality are not sufficient for the purpose" of maintaining the essential or special services mentioned. It appears from the bill that the regular tax levies available to the city had been used, from which it follows, of course, that the fees, rentals, and charges cannot be defended as general taxation. The city is therefore driven to rest its claim on the basis that the charges imposed are special assessments under the act, and that act provides that assessments may be imposed upon the users of the services intended to be provided for, and impliedly negatives the idea that they be imposed on property alone or upon a class of people owning property. Proceeding under the act, the city is bound by its terms.

The city attempts to conform to the terms of the act by providing in section 2 of the ordinances that rates, fees, and rentals are imposed upon the "users of each and (sic) such services." However, we must judge the ordinances by their effect and not from a statement of what is proposed to be done. As stated above, the ordinances do not impose charges upon all users, but only a limited class thereof, and make ownership of property the basis of the charges imposed.

Bearing upon what we may reasonably conclude the Legislature had in mind in enacting this law, and the persons sought to be affected thereby, attention is called to the fact that an ordinance of this character is required to be published once a week for two successive weeks in two local newspapers, and if 10 per cent. of the registered voters, by written petition, protest against the same, it shall not become effective until it has been ratified by a majority of the votes cast by the duly qualified voters of such municipality at an election duly and regularly held as provided by the laws and ordinances thereof. This provision, it seems to us, necessarily implies that the charges imposed must, in theory at least, apply to all users of the services provided for, living within the municipality. . . .

It cannot be said that the services provided for in the questioned ordinances are special benefits to property in the sense that the paving of a street in front of a property, which permanently adds to its value, is a special benefit for which special assessments may be imposed. The ordinances in question, as applied to fire protection, may be said to benefit, temporarily, the owners of property, but no permanent value is added to the property affected thereby. As to street lighting, sewerage, garbage collection, and street cleaning, little, if any, benefits accrue to the owners of property which are not shared by the public at large. While it may be said that fire protection, lighted and clean streets, good sewerage and the safe health conditions which a proper disposal of garbage develops, all tend to add value to property in a given community, it may also be said that good streets, modern school buildings. gymnasiums, auditoriums, parks, playgrounds, and numerous other public conveniences which make urban life attractive add to the value of property. However, none of these conveniences are usually classified as giving a peculiar and added permanent value to a particular property, such as to justify a special assessment of the nature of one imposed for street paving or other improvements which unquestionably do add to the permanent value of property affected thereby.

The ordinance as to fire protection provides for an assessment on buildings and chattels. Giving to the statute, and the ordinance adopted thereunder, a liberal construction, the owners of the buildings and chattels may fairly be said to be the users of the services provided for their protection. True, these assessments are based on the value of the buildings and chattels, but no reference is made to the assessed values on which levies are laid, nor is the entire value of real estate in particular made the basis of the assessment, but only the buildings located thereon. If the assessed value were used, and the fee assessed, a serious question would have been raised as to a violation of the limitation amendment, and as the matter stands, the validity of the assessment as to personal property remains in doubt, the only saving feature being that the assessment as to this class of property is

not based on the assessed value for tax purposes. On the whole, we conclude and hold that the proposed ordinance as applied to fire protection should be upheld.

But we cannot go further. Strong insistence is made in support of the ordinance as to street lighting, and we have carefully studied the briefs on that question, including that filed by counsel appearing as amicus curiæ. The cases cited in support of the contention as to street lighting, in our opinion, do nothing more than support the theory that street lighting equipment, and possibly the furnishing of electric current, are public improvements, the cost of which may be assessed on property especially benefited thereby, where there is legislative authority therefor. In each case cited, there was legislative authority behind the ordinance imposing an assessment of the same general nature as our statute, Code, 8-8-1 et seg., concerning paving. In the case at bar, such legislative authority is wholly lacking, and we do not think the authority cited applicable to the situation presented here. Had the Legislature provided that the cost of these services be imposed upon the owners of real estate, either on a lineal foot basis or the value of the property affected, the question would have arisen as to whether or not the levy limitation had been violated, and whether the act should be sustained under the theory of special benefits. It did not choose to do so, and we see no reason to construe such meaning into the statute as enacted.

There are other considerations which strengthen our view that the ordinance as to street lighting cannot be upheld. It may be true that a system of street lighting confers a special benefit on a particular individual who happens to own real estate on an important highway, particularly in the business section of the city: yet the furnishing of street lights is a governmental responsibility and the owner of such a building has, presumably, on account of its location and value, paid his fair share of the expense of the entire street lighting system of the city, including the section in which his property is located. Under these circumstances, it is difficult to accept a theory that the owner of such building must be assessed with the entire cost of lighting the street, to the exclusion of a tenant who may have a stock of merchandise in the building equal to or in excess of the value of the building, and to the exclusion of those who use the street, either as pedestrians or by the various means of transportation used in carrying on traffic over the streets so lighted. What seems to us the inherent injustice of imposing such a burden on a particular class of individuals does not encourage us to give a strained construction to the statute in question. With all the admitted difficulty in working out a formula under which the provisions of the statute may be carried out, we are unable to accept as sound the arguments ad-

vanced that the word "users" be given a meaning under which a special class of property owners are laid under a burden which, in all fairness, should be borne by all alike, in proportion to property valuation under general taxation; but if this cannot be provided for under our levy limitation, a more equitable plan than that proposed should be adopted. This court cannot set itself up as an arbiter of what is fair. That is a legislative function. But the Legislature having imposed the burden of these services on the users thereof, we are not disposed to give its enactment a meaning not fairly to be drawn from the language used, nor compatible with what we believe to be a just distribution of the burden of the services provided for in the act in question. What we have said with respect to street lighting more strongly applies to the other services provided for, other than fire protection, and it is not considered necessary to discuss them in detail. If the assessment for street lighting cannot be sustained, the assessments for such other services cannot be.

Affirmed in part; reversed in part; remanded.

It is elementary learning that the exaction of fees under the police power is an incident to the particular regulation and as such is confined to charges in keeping with the cost of regulation. In practice this limitation is not and hardly could be applied with precision. Thus, many municipalities make money from the operation of parking meters. More significant, however, in the case of parking meters, is the possibility of financing related activities under a liberal interpretation of "regulation". Thus, it has been urged that parking meter revenues should be open to utilization for "any purpose which is substantially connected with the problem of traffic control and regulation, including traffic enforcement, traffic engineering, traffic circulation, purchase of off-street parking facilities, signalization, street signs, traffic-enforcement officers' salaries, as well as the purchase, installation, supervision, protection, inspection, maintenance and operation of the parking meters themselves". Marion A. Grimes, "The Legality of Parking Meter Ordinances and Permissible Use of Parking Meter Funds" 35 Cal.L.Rev. 235, 250 (1947). Whether the courts will go so far as to support this type of financing for off-street parking projects remains to be seen.

D. INCOME FROM ENTERPRISES

"A municipally owned utility is entitled to receive a fair return by way of interest upon the investment the same as a pri-

vately owned utility, and the matter of earning such return or not is one of policy for the municipal authorities." City of Logansport v. Public Service Commission, 202 Ind. 523, 177 N.E. 249, 255 (1931). Many municipalities in Indiana have used net utility revenues to keep down property tax levies. See Harry T. Ice, "Municipal Ownership of Utilities in Indiana" 22 Ind.L.J. 11 (1946). Over the country at large utility contribution to general municipal purposes have been surprisingly low. Census Bureau figures for 1942 covering 397 cities over 25,000 in population disclose that utility contributions made up only a little over one per centum of total revenues. See A. M. Hillhouse and associates, "Where Cities Get Their Money" 128 (Mun. Finance Officers Ass'n, 1945). In Nashville, Tennessee, the municipal electric system contributes to the general fund by making payments in lieu of taxes, which are accounted for as current expenditures rather than transfers from net earnings. The properties are, of course, tax-exempt. The device used tends to obscure the true nature of the contribution.

While local sewage facilities are commonly classified, along with garbage collection, in a service category affected by police power considerations as to public health, it is believed that they may more appropriately be considered utilities. Sewer and water systems are complementary and quite commonly they are financed and operated as a single system. The fact that sewer connections may be made compulsory does not alter the character of the facility or service. The most popular bases employed in fixing sewer "rentals", rates or charges have been fixed percentage of water bill, metered water consumption and number of plumbing fixtures. These or any other methods bearing a reasonable relation to the use of the service should withstand attack in the courts. See State v. City of Miami, 157 Fla. 726. 27 So.2d 118 (1946) (fixed percentage of water bill method), citing other cases. See also Gericke v. City of Philadelphia. 353 Pa. 60, 44 A.2d 233 (1945). In the Florida case it was further decided that water service might validly be shut off as a sanction to enforce payment of sewer charges.

E. REVENUE-ANTICIPATION BORROWING

Unless a local unit collects its property taxes in advance, or has a relatively even inflow of revenues due to instalment payment of property taxes or large income from other sources, it may be put to the necessity of borrowing in anticipation of revenue receipts in order to finance current operations. Whether tax-anticipation notes may be issued before a tax levy is laid or

may run for a period extending beyond the current fiscal year are questions which depend upon the particular enabling legislation. The same is true of the question whether a general obligation may be incurred or only a special one payable exclusively from the revenues anticipated. The design in any event is to use the revenues, once collected, to retire the notes, or what not, by which they were anticipated. General obligations have a better market, which may be expected to be reflected in interest rates. If the statute authorizes general obligation borrowing the question may arise whether that borrowing would involve the incurring of debt within the meaning of constitutional debt limitations. Some constitutional debt limitations expressly except tax-anticipation borrowing without clearly identifying it as the general or special obligation type. That of North Carolina, however, refers explicitly to borrowing on the faith and credit of the local unit. N.C.Const. Art. V, Sec. 4, as amended in 1936.

CITY OF GEORGETOWN v. ELLIOTT

Circuit Court of Appeals of the United States, Fourth Circuit, 1938. 95 F.2d 774.

PARKER, CIRCUIT JUDGE. This is an appeal from a judgment for plaintiffs on a note for \$8.000 issued by the City of Georgetown, S. C. The complaint alleges that the note was duly issued by the city and that the bank of which plaintiffs are receivers purchased it for value and in good faith before maturity and became a holder thereof in due course. The note, which is set forth in full in the complaint and contains a general promise to pay on the part of the city, is dated September 15, 1931, and recites that it was issued for money borrowed for corporate purposes in anticipation of municipal taxes for the current year, pursuant to section 7 of article 8 of the Constitution of South Carolina and section 4554 of the Code of Laws of South Carolina of 1922 (Civil Code). There is no allegation of collection of taxes for 1931 by the city or of their availability for the payment of the note; and both by demurrer and answer the point was made that it was not a general obligation of the city, but was payable only out of taxes for that year. Only one question is presented by the appeal, viz., whether such a note creates a valid indebtedness on the part of the city for which a general judgment may be rendered, in the absence of allegation and proof that taxes available for its payment have been collected from the levy of the year in which it was issued. We think that this question must be answered in the affirmative.

If the statute under which the note was issued be considered without reference to constitutional restrictions, there can be no

question but that it authorizes the creation of a general obligation on the part of the city by the issuance of tax anticipation notes. The pertinent part of that statute, Civ.Code S.C.1922, § 4554, is as follows: "That in the anticipation of the collection of taxes in any fiscal year said City or Town Council, whether such city or town be chartered by special Act of the General Assembly or under the general law, may from time to time, as occasion may require, borrow money for corporate purposes on its note or notes, and pledge the taxes levied, or to be levied, in said year for corporate purposes, for the payment of such note or notes and the discount or interest thereon, and such note or notes it is hereby authorized to discount generally, if desired, without responsibility to the person or corporation advancing money on said security, to see to the application of the funds realized thereon."

And we do not think that any different conclusion is required when the limitations of the State Constitution are taken into account. Article 8, § 7, of that instrument, which is the one relied on, after limiting the bonded debt of municipalities to 8 per cent. of the assessed value of their taxable property and requiring an election as a prerequisite to the creation of such debt, contains the following proviso: "Provided, That this Section shall not be construed to prevent the issuing of certificates of indebtedness in anticipation of the collection of taxes for amounts actually contained or to be contained in the taxes for the year when such certificates are issued and payable out of such taxes."

The city would have us construe this proviso as forbidding the issuance of any sort of obligation in anticipation of taxes except nonnegotiable certificates payable only out of tax collections for the year. This would be to read into the proviso language which it does not contain and to establish a limitation on municipal borrowing in anticipation of tax collections which, in our opinion, would be utterly unreasonable and which would result in making it practically impossible for municipalities in South Carolina to borrow money for carrying on the most necessary municipal activities pending the collection of their taxes. As was well said by the late Judge Ernest F. Cochran in Citizens & Southern National Bank of Savannah v. The City of Florence (an unreported decision of the District Court for the Eastern District of South Carolina): "It is argued, however, that tax anticipation notes must be payable out of the taxes pledged, and if for any reason these taxes fail or are dissipated, the holder of the note can collect nothing from the city. I cannot accede to this proposition. The framers of the Constitution, when they permitted tax anticipation notes, must be deemed to have known something of the practical effect that such a construction of the law would have upon the credit of the city. The holders of these notes are

not responsible for the action of the city authorities in taking the taxes which were pledged for the notes and using them for other corporate purposes. This the holders of the notes could not prevent, nor were they required to stand guard over the collections and insist as each collection came in on its being applied to their notes. That would be utterly impracticable. The city authorities are not their agents, but the agents of the people of Florence. They had a right to assume that the city officials would not unlawfully divert these pledged taxes. To hold that because the city officials have taken the pledged taxes and used them for other corporate purposes, the city thereby escapes liability, would render these tax anticipation notes unsalable. No business man would lend money on such notes."

Article 8, § 7, of the Constitution was intended as a limitation upon the power of the municipality to create a debt by the issuance of bonds, not as a limitation upon the power to borrow money for short periods in anticipation of the collection of taxes; and it has been expressly held by the Supreme Court of South Carolina that obligations "secured by the pledge of a fund which might reasonably be expected to be sufficient to meet the obligations without resorting to the levy of a property tax did [do] not constitute bonded debt within the meaning of the constitutional limitations, notwithstanding that the full faith, credit, and taxing power of a political subdivision were pledged for the payment of the obligations." Briggs v. Greenville County, 137 S.C. 288, 305, 135 S.E. 153, 158. The pledge of taxes levied but not collected is clearly the pledge of a fund within the meaning of this rule. Sullivan v. City Council of Charleston, S. C., 130 S.E. 876.

For the reasons stated, the judgment appealed from will be affirmed.

Affirmed.

The same result has been reached in Maine under a constitutional debt limitation which excepts "temporary loans to be paid out of the money raised by taxes during the year in which they were made." Waken v. Inhabitants of Town of Van Buren, 137 Me. 127, 15 A.2d 873 (1940).

SECTION 3. BORROWING

The American Law Institute and the National Conference of Commissioners on Uniform State Laws are jointly engaged in the drafting of a uniform commercial code. Work on this extremely significant project is far advanced. On April 26, 1948, a proposed final draft of Article V—Investment Instruments was issued. There is a separate article on commercial paper, which generally covers old N.I.L. ground. Bearer and registered bonds, however, as well as certificates of stock, are governed by Article V. The article applies to municipals as well as corporate securities. While the student should become familiar with this important development it is not considered wise to undertake here more than the major assignment of studying the law of municipal bonds as it now stands.

In order to show how the process of authorizing and issuing municipal bonds works there is reproduced, in the pages which immediately follow, a municipal bond transcript. (From here on we will speak of it simply as the transcript.) In financial circles state bonds as well as those of various types of local units are called municipals. For present purposes the term will be used to refer to bonds of any type of unit of local government. Municipals are marketed upon the approving opinions of bond counsel. These attorneys make up a highly specialized branch of the profession. There are a number of municipal bond firms in New York and other large cities of recognized national standing. Their opinions, accordingly, are adequate for a national market. There are other bond attorneys whose opinions are accepted over a whole region or in the particular state of the issuing unit.

Bond counsel may be retained either by the borrower or the purchasers. The former alternative has the advantage of providing expert guidance from the start, facilitating ultimate legal approval and affording bidders the benefit of a preliminary legal opinion prior to sale. A question may arise as to legal authority of the local unit to retain and compensate bond attorneys where the unit's own attorney has the responsibility to advise it on all legal matters. There should be little difficulty in sustaining the authority, however, since the opinion of bond counsel is a practical sine qua non and since the fee entailed would be one of the costs of issue properly payable from the bond proceeds. See Crick v. Rash, 190 Ky. 820, 229 S.W. 63 (1921).

If in the picture from the outset, and particularly where the borrower is a small unit without the services of experienced local counsel, the bond attorney may prepare the proceedings of the local governing body and all supporting documents. At the minimum, local counsel can be of great assistance in guiding the proceedings right on the scene. Certified extracts from the proceedings of the local governing body covering all action taken with respect to the authorization and issuance of the bonds and various supporting documents, designed to show the de jure

status of the unit and such of its officers as are acting with respect to the issue and to make a record that all positive requirements of law have been met and all restrictions observed, make up the bond transcript.

A North Carolina issue has been selected for purposes of illustration both because the state's legislation governing local borrowing is relatively well-conceived and because a state administrative agency, the Local Government Commission, has a hand in the proceedings. The Commission approves an issue and conducts the bond sale.

In studying the bond transcript reference should be made to the state constitutional limitations on local indebtedness (Art. V, § 4, and Art. VII, § 7), to the Local Government Acts (Gen.Stats. of N.C., c. 159, 1943) and to the Municipal Finance Act (Gen.Stats. of N.C., § 160–367 et seq., 1943.) See also W. H. Hoyt and J. B. Fordham, "Constitutional Restrictions upon Public Debt in North Carolina" 16 N.C.L.Rev. 329 (1938). There are some discrepancies in the transcript. The student might well undertake to spot and appraise them. That, of course, is something which bond counsel must do. It should be evident that complete elimination of all discrepancies would seldom be achieved.

The transcript appears at the outset of the section to facilitate reference. It will be helpful to refer to it in connection with particular problems, but consideration of it as a whole may well be deferred to follow subsection b, which relates to investors' safeguards.

Transcript of Proceedings Relating to an Issue of \$300,000 Water and Sewer Bonds of the Town of Landis, North Carolina.

STATE OF NORTH CAROLINA TOWN OF LANDIS ss.:

- I, J. Fred Corriher, Town Clerk of the Town of Landis, in the State of North Carolina, do hereby certify as follows:
- 1. The municipal corporation of the State of North Carolina known as the "Town of Landis" was duly incorporated and established as a town of said State in the year 1901. Since its incorporation and establishment said Town has continuously exercised the corporate powers given to it by the laws of North Carolina. The government of said Town is now organized pursuant to and in accordance with Chapter 245 of the Private Laws of 1901, and the acts amendatory thereof and supplemental thereto.
- 2. All the territory included in said Town is within the County of Rowan.
- 3. No election has ever been held in said Town, either pursuant to the provisions of Articles 21, 22 and 23 of Chapter 160 of

the General Statutes of North Carolina, or pursuant to any other law, for the adoption of a plan of government or for the amendment or repeal of the charter of said Town, or for the adoption of a new charter, and the governing body of said Town has never taken any proceedings for such purpose.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of said Town of Landis, this 17th day of October, 1946.

> J. Fred Corriher, Town Clerk of the Town of Landis, North Carolina.

STATE OF NORTH CAROLINA TOWN OF LANDIS ss.:

- I, J. Fred Corriher, Town Clerk of the Town of Landis, in the State of North Carolina, do hereby certify as follows:
- 1. At all times since December 1, 1945, L. A. Corriher has been Mayor of said Town and J. F. Lipe, George W. Wright, J. U. Alexander and P. K. Dry have been Aldermen of said Town, having been elected to said offices at an election duly called and held in said Town on May 1, 1945. The terms of office of said persons will not expire until May 6, 1947.
- 2. At all times since April 1, 1940, O. A. Corriher has been Clerk of said Town, having been duly appointed to such office from time to time by the Board of Aldermen of said Town. His term of office will not expire until May 6, 1947. On April 15, 1944, the Board of Aldermen of said Town, upon application of said O. A. Corriher, granted said O. A. Corriher leave of absence from his duties for military or naval service, in accordance with Chapter 121 of the Public Laws of 1941 of North Carolina, and such leave of absence has not expired. On April 15, 1944, said Board of Aldermen duly appointed the undersigned, J. Fred Corriher to act as Town Clerk during the leave of absence granted to said O. A. Corriher.
- 3. Each of the persons hereinabove described, where required by law, gave an official bond complying with all legal requirements, before his term of office began. None of said persons has died or resigned his office or been removed from office, except as hereinbefore stated.
- 4. None of the persons hereinbefore named has held or exercised any office or place of trust or profit under the United States or any department thereof, or under the State of North Carolina, or under any other State government at the time of or since his election or appointment to the respective office to which he was

elected or appointed as hereinabove stated, except the respective office to which he was elected or appointed as hereinabove stated.

5. Prior to the 1st day of April, 1940, said Board of Aldermen duly adopted a resolution providing that regular meetings of said Board should be held at Town Hall in said Town at 8:00 o'clock, P. M., on the following days in each month:

First Tuesday in month.

Said resolution has never been amended or rescinded.

- 6. The population of said Town, as determined by the Federal Census made in 1940 was 1650. It is estimated that the present population is 2000.
- 7. The seal an impression of which appears below is the corporate seal of said Town. Said seal has been continually used as the corporate seal of said Town for more than thirty years. Said seal was adopted as the seal of said Town by resolution duly adopted by the Board of Aldermen of said Town, and the resolution adopting said seal has never been amended or rescinded, and no seal other than said seal has been adopted as the corporate seal of said Town.
- 8. On the 3rd day of May, 1939, the Board of Aldermen of said Town appointed Thornwell G. Furr to be Town Attorney for said Town, and said Thornwell G. Furr has been Town Attorney for said Town at all times since his appointment.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of said Town, this 17th day of October, 1946.

J. Fred Corriher,

Town Clerk of the Town of Landis, North Carolina.

STATE OF NORTH CAROLINA TOWN OF LANDIS ss.:

I, J. Fred Corriher, Town Clerk of the Town of Landis, in the State of North Carolina, do hereby certify that I have compared the attached extracts from minutes with the original minutes of a call meeting of the Board of Aldermen of said Town held on the 3rd day of April, 1946, and that said extracts are a true copy of said minutes and of the whole thereof, in so far as said minutes relate to the matters mentioned and described in said extracts.

I further certify that the minutes from which said extracts have been taken have been duly recorded in the official minute book of said Board of Aldermen and appear at pages 11a to 117, inclusive, thereof, and that said extracts show all acts done or proceedings taken by said Board of Aldermen at said meeting, in any way relating to or affecting the issuance of the bonds mentioned and described in said extracts.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of said Town this 20th day of April, 1946.

J. Fred Corriber,

Town Clerk of the Town of Landis, North Carolina.

EXTRACTS FROM MINUTES OF BOARD OF ALDERMEN

At a special called meeting of the Board of Aldermen of the Town of Landis to meet at the Mayor's office on Wednesday April 3rd, at 4 o'clock P. M. to consider and pass upon the issuance of bonds to finance the building and constructing a sewer and water system for the Town of Landis, N. C. The following members of the Board were present L. A. Corriher, Mayor, P. K. Dry, J. U. Alexander, J. F. Lipe and Geo. W. Wright.

P. K. Dry moved that the following resolution be adopted:

"Whereas, it is necessary to designate an officer of the Town of Landis to prepare and file sworn statements of indebtedness after the introduction and prior to the adoption of bond ordinances in accordance with The Municipal Finance Act, 1921: Now, Therefore,

Be It Resolved, that the Mayor be and he hereby is designated as the officer to prepare and file such sworn statements of indebtedness, and also to determine the amount to be inserted in any such statement as the estimated amount of any special assessments thereafter to be levied on account of local improvements for which any part of the gross debt set forth in such statement was or is to be incurred, and which, when collected, will be applied to the payment of such gross debt."

- J. U. Alexander seconded the motion, and the motion was adopted. Those voting for the motion were Messrs. J. U. Alexander, J. F. Lipe, P. K. Dry and Geo. W. Wright. No one voted against it.
- P. K. Dry introduced the following bond ordinance which was read at length to the Board:

"AN ORDINANCE AUTHORIZING THE ISSUANCE OF \$100,000 OF BONDS OF THE TOWN OF LANDIS FOR THE ESTABLISHMENT OF A WATER SUPPLY SYSTEM FOR THE TOWN OF LANDIS.

"Be It Ordained by the Board of Aldermen of the Town of Landis, as follows:

"Section 1. The Board of Aldermen of the Town of Landis has ascertained and hereby determines that it is necessary that said

Town construct a water supply system to supply water to said Town and its inhabitants, and that it will be necessary to expend for said purpose not less than \$100,000, in addition to moneys heretofore raised for such purpose.

- "Section 2. Said Board of Aldermen has also ascertained and hereby determines that the purpose hereinbefore described is a necessary expense of said Town within the meaning of Section 7 of Article VII of the Constitution of North Carolina, and is a purpose for which said Town may raise or appropriate money, and is not a current expense of said Town.
- "Section 3. In order to raise the money required for such purpose, bonds of the Town of Landis are hereby authorized and shall be issued pursuant to The Municipal Finance Act, 1921, of North Carolina. The maximum aggregate amount of bonds authorized by this ordinance shall be One Hundred Thousand Dollars (\$100,-000).
- "Section 4. A tax sufficient to pay the principal of and interest on said bonds shall be annually levied and collected.
- "Section 5. A statement of the debt of said Town has been filed with the Town Clerk of said Town, as required by said Act, and is open to public inspection.
- "Section 6. This ordinance shall take effect when approved by the voters of said Town at an election to be called and held as provided in said Act."
- J. F. Lipe introduced the following bond ordinance which was read at length to the Board:
- "AN ORDINANCE AUTHORIZING THE ISSUANCE OF \$200,000 OF BONDS OF THE TOWN OF LANDIS FOR THE ESTABLISHMENT OF A SANITARY SEWER SYSTEM FOR THE TOWN OF LANDIS.

"Be It Ordained by the Board of Aldermen of the Town of Landis, as follows:

- "Section 1. The Board of Aldermen of the Town of Landis has ascertained and hereby determines that it is necessary that said Town construct a sanitary sewer system in said Town, and that it will be necessary to expend for said purpose not less than \$200,000, in addition to moneys heretofore raised for such purpose, and that said sanitary sewer system will be entirely supported by sewerage service charges to be charged for sewerage service in accordance with a schedule to be determined and fixed by the Board of Aldermen.
- "Section 2. Said Board of Aldermen has also ascertained and hereby determines that the purpose hereinbefore described is a

necessary expense of said Town within the meaning of Section 7 of Article VII of the Constitution of North Carolina, and is a purpose for which said Town may raise or appropriate money, and is not a current expense of said Town.

- "Section 3. In order to raise the money required for such purpose, bonds of the Town of Landis are hereby authorized and shall be issued pursuant to The Municipal Finance Act, 1921, of North Carolina. The maximum aggregate amount of bonds authorized by this ordinance shall be Two Hundred Thousand Dollars (\$200,-000).
- "Section 4. A tax sufficient to pay the principal of and interest on said bonds shall be annually levied and collected.
- "Section 5. A statement of the debt of said Town has been filed with the Town Clerk of said Town, as required by said Act, and is open to public inspection.
- "Section 6. This ordinance shall take effect when approved by the voters of said Town at an election to be called and held as provided in said Act."

The Town Clerk then presented to the Board of Aldermen a sworn statement of indebtedness of the Town and stated that the statement was filed in his office by the Mayor after the introduction of the bond ordinances introduced at this meeting. The statement was examined and considered by the Board of Aldermen.

- P. K. Dry moved that the ordinance entitled "An Ordinance authorizing the issuance of \$100,000 of bonds of the Town of Landis for the establishment of a water supply system for the Town of Landis", heretofore introduced at this meeting, be adopted. J. U. Alexander seconded the motion, and the motion was adopted. Those voting for the motion were Messrs. P. K. Dry, J. U. Alexander, J. F. Lipe and Geo. W. Wright. No one voted against it.
- J. F. Lipe moved that the ordinance entitled "An Ordinance authorizing the issuance of \$200,000 of bonds of the Town of Landis for the establishment of a sanitary sewer system for the Town of Landis", heretofore introduced at this meeting, be adopted. Geo. W. Wright seconded the motion, and the motion was adopted. Those voting for the motion were Messrs. J. F. Lipe, Geo. W. Wright, J. U. Alexander and P. K. Dry. No one voted against it.
- J. F. Lipe moved that a copy of each bond ordinance adopted at this meeting with notice of adoption in the form required by law, be published once in each of two successive weeks in THE SALISBURY EVENING POST, a newspaper published in Salisbury, North Carolina.

Geo. W. Wright seconded the motion, and the motion was adopted. Those voting for the motion were Messrs. J. F. Lipe, Geo. W. Wright, J. U. Alexander and P. K. Dry. No one voted against it.

P. K. Dry moved that the following resolution be adopted:

"Whereas, the Board of Aldermen has heretofore adopted the ordinances hereinafter described authorizing the issuance of bonds, and such ordinances and the indebtedness to be incurred by the issuance of the bonds authorized thereby should be submitted to the voters of the Town of Landis for their approval or disapproval: Now, Therefore,

Be It Resolved by the Board of Aldermen of the Town of Landis, as follows:

Section 1. A Special Election shall be held in the Town of Landis on the 21st day of May, 1946, for the purpose of submitting to the qualified voters of said Town, for their approval or disapproval, the ordinances described in the notice hereinafter set forth and also the indebtedness to be incurred by the issuance of the bonds authorized by said ordinances.

Section 2. The Town Clerk is hereby authorized and directed to publish a notice of said special election in substantially the following form:

TOWN OF LANDIS, NORTH CAROLINA. NOTICE OF NEW REGISTRATION OF VOTERS AND OF SPECIAL ELECTION.

Notice is Hereby Given that a Special Election will be held in the Town of Landis, North Carolina, on the 21st day of May, 1946, for the purpose of submitting to the qualified voters of said Town, for their approval or disapproval, two bond ordinances, hereinafter described, adopted by the Board of Aldermen on the 3rd day of April, 1946, and also the indebtedness proposed to be incurred by the issuance of the bonds authorized by the ordinances. Said bond ordinances are as follows:

- (1) An Ordinance entitled "An Ordinance authorizing the issuance of \$100,000 of bonds of the Town of Landis for the establishment of a water supply system for the Town of Landis", authorizing the issuance of bonds of the Town of Landis of the maximum aggregate amount of \$100,000 to finance the construction of a water supply system to supply water to said Town and its inhabitants.
- (2) An Ordinance entitled "An Ordinance authorizing the issuance of \$200,000 of bonds of the Town of Landis for the establishment of sanitary sewer system for the Town of Landis", authorizing the issuance of bonds of the Town of Landis of the maximum aggregate amount of \$200,000 to

finance the construction of a sanitary sewer system in said Town.

Each ordinance authorizes the levy and collection of an annual tax sufficient to pay the principal of and interest on the bonds thereby authorized.

The polls for said election will open at the hour of 6:30 o'clock, A.M., and will close at the hour of 6:30 o'clock, P.M., Eastern Standard Time. The polling place for said election shall be at Office of the Police Department in the Town of Landis.

The Board of Aldermen of the Town of Landis has appointed Jeannette Stoudt to act as Registrar, and John D. Correll and R. G. Dayvault to act as Judges of Election for said election.

Notice is Also Hereby Given, that a new registration of the qualified voters of the Town of Landis for said election has been ordered by the Board of Aldermen of said Town. The Registrar will keep open the book for new registration from 9 o'clock, A.M., until 6 o'clock, P.M., on each day, except Sundays and holidays, for three weeks, beginning on Monday, the 22nd day of April, 1946, and ending on Saturday, the 11th day of May, 1946, being the second Saturday before said election. On each Saturday during the registration period said book will be kept open at the polling place above named.

By order of the Board of Aldermen of the Town of Landis. Dated, April 4th, 1946.

J. Fred Corriher Town Clerk of the Town of Landis, North Carolina.

Said notice shall be published at least once in THE SALISBURY EVENING POST, a newspaper published in ————, North Carolina, not later than April 8th, 1946.

Section 3. The polls for said election shall be opened and closed at the times and at the place, and electors shall be registered for said election in the manner stated in said notice. The respective persons named as Registrar and Judges of Election in said notice are hereby appointed to be such Registrar and Judges of Election and are hereby authorized and directed to register electors for said election and to hold and conduct said election as provided by law.

Section 4. The ballots to be used at said election shall be in substantially the following form:

(1) To vote "YES" on any question, make a cross (X) mark in the square to the right of the word "YES".

YES |

NO

YES

NO

П

(2) To vote "NO" on any question, make a cross (X) mark in the square to the right of the word "NO".

(3) If you tear or deface or wrongly mark this ballot, return it and get another.

PROPOSITION NO. 1

SHALL the qualified voters of the Town of Landis approve the ordinance adopted by the Board of Aldermen of said Town on April 3rd. 1946, entitled "An Ordinance authorizing the issuance of \$100,000 of bonds of the Town of Landis for the establishment of a water supply system for the Town of Landis", which ordinance authorizes the issuance of bonds of said Town of the maximum aggregate amount of \$100,000 to finance the construction of a water supply system to supply water to said Town and its inhabitants, and authorizes the levy of a tax sufficient to pay the principal of and interest on said bonds; and also approve the indebtedness to be incurred by the issuance of said bonds?

PROPOSITION NO. 2

SHALL the qualified voters of the Town of Landis approve the ordinance adopted by the Board of Aldermen of said Town on April 3rd, 1946, entitled "An Ordinance authorizing the issuance of \$200,000 of bonds of the Town of Landis for the establishment of a sanitary sewer system for the Town of Landis", which ordinance authorizes the issuance of bonds of said Town of the maximum aggregate amount of \$200,000 to finance the construction of a sanitary sewer system in said Town, and authorizes the levy of a tax sufficient to pay the principal of and interest on said bonds; and also approve the indebtedness to be incurred by the issuance of said bonds?

J. Fred Corriher Fac-simile signature of Town Clerk.

Section 5. The Town Clerk is hereby authorized and directed to cause said ballots to be prepared and to furnish said ballots and

the necessary registration book and ballot box for the use of said Registrar and Judges of Election."

- J. U. Alexander seconded the motion, and the motion was adopted. Those voting for the motion were Messrs. J. F. Lipe, P. K. Dry, J. U. Alexander and Geo. W. Wright. No one voted against it.
- J. F. Lipe made a motion to adjourn to meet at the call of the Mayor. Motion carried.

L. A. Corriher, Mayor of the Town of Landis, North Carolina.

J. Fred Corriher Town Clerk of the Town of Landis, North Carolina.

STATE OF NORTH CAROLINA TOWN OF LANDIS ss.

I, J. Fred Corriher, Town Clerk of the Town of Landis, in the State of North Carolina, do hereby certify that I have compared the attached copy of financial statement with the original financial statement filed by the Mayor of said Town in the office of the Town Clerk of said Town on the 3rd day of April, 1946, and that said copy is a true copy of said statement and of the whole thereof.

I further certify that said statement was so filed in the office of said Town Clerk after the introduction and prior to the adoption of the ordinances authorizing \$100,000 Water Bonds and \$200,000 Sewer Bonds of said Town adopted by the Board of Aldermen of said Town on the 3rd day of April, 1946, and that said statement has, since it was so filed, remained on file in the office of said Town Clerk and has been kept open to public inspection.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of said Town this 2d day of April, 1946.

J. Fred Corriher Town Clerk of the Town of Landis, North Carolina.

E.

Dated April 3, 1946.

0.58%

FINE C E C E C IL 3	D DEBT OF MADE AND ANCE ACT, RDINANCE OVERNING 3, 1946, AU- OF BONDS, SAID ORDI-
\$_ \$_	66,000.00
֡	FIN E C E G IL 3 .00 F 5

	(3) Bonded debt to be incurred under ordinances passed or introduced, consisting of the following issues:		
	PURPOSE OF ISSUE AMOUNT		
	Water System \$100,000.00		
	Sewer System 200,000.00		
		\$	300,000.00
	TOTAL GROSS DEBT,	\$	366,000.00
B.	DEDUCTIONS FROM GROSS DEBT, as listed in attached "Schedule of Deductions"	\$	351,150.00
C.	NET DEBT,	\$	14,850.00
D.	Assessed valuation of property as last fixed for municipal taxation		2,594,818.00

Percentage that said net debt bears to said assessed valuation,

L. A. Corriher. Mayor of the Town of Landis, North Carolina.

SCHEDULE OF BONDED DEBTS

		SCHEDULE OF BUNDED DEB		
	e of Issue	Purpose of Issue	Am	ount of Issue
	1/1937	Street Improvements		\$16,000
12/	1/1945	Water Supply System		15 ,000
12/:	1/1945	Sewer System		35,000
		TOTAL BONDED DE	BT,	\$66,000.00
		SCHEDULE OF DEDUCTION	S	
(1)	Unissued cluded in	funding or refunding bonds, in- the gross debt,	\$_	000
(2)		funds or other funds held for the		
	other the	of any part of the gross debt an debt incurred for water, gas, ght or power purposes, or two or said purposes,		000
(3)		ed special assessments hereto-		V • V
	fore levi- ments fo debt was	ed on account of local improve- r which any part of the gross or is to be incurred which will be		
		when collected to the payment rt of the gross debt,		1,150.00
(4)	ied on ac which an to be ince will be ap of the gro- being est	ed special assessments to be lev- count of local improvements for y part of the gross debt was or is urred and which when collected plied to the payment of any part ass debt (the amount of this item imated by the undersigned offi- nated for that purpose by the		
	governing	g body of the municipality),		000
(5)	and incur gas, elect	lebt included in the gross debt red or to be incurred for water, ric light or power purposes, or ore of said purposes,		115,000.00
(6)	Bonded of and incur struction disposal p ing entire	lebt included in the gross debt, red or to be incurred for the con- of sewerage systems or sewage lants, said sewerage systems be- ely supported by sewerage ser-		
(7)	and incur struction disposal p gether we nicipality ed system the amoun interest pa	ges, lebt included in the gross debt red or to be incurred for the conof sewerage systems or sewage plants which are operated toth the waterworks of said muas a combined and consolidational and as an integral part thereof, it necessary to meet the annual ayable on such bonded debt, and il installment necessary for the		235,000.00

amortization of such debt, and the amount
necessary for repairs, maintenance and
operation of said system or systems being
included in the rate for waterworks serv-
ice and collected by said municipality,

(8) The amount which said municipality is entitled to receive from any railroad or street railway company under contract heretofore made for the payment by such company of all or a portion of the cost of eliminating a grade crossing or crossings within said municipality, which amount will be applied, when received, to the payment of part of the gross debt.

(9) Indebtedness for school purposes, included in the gross debt.

000

000

TOTAL OF DEDUCTIONS, \$ 351,150.00

STATE OF NORTH CAROLINA COUNTY OF ROWAN SS.

L. A. Corriher, being duly sworn, says, that he is the Mayor of the Town of Landis, in the State of North Carolina; that by a resolution passed by the governing body of said municipality he was authorized and directed to make the foregoing statement; and that the foregoing statement is true and was made and subscribed by him after the introduction and before the final passage of the ordinance or ordinances referred to in the heading of said statement.

L. A. Corriher.

Sworn to and subscribed before me on the day of the date of said statement. J. H. Shulenberger,

J. H. Snulenberger, Notarv Public

My commission expires the 30th day of April, 1946

STATE OF NORTH CAROLINA COUNTY OF ROWAN ss.:

I, the undersigned Town Clerk of the Town of Landis, in the State of North Carolina, do hereby certify that the foregoing statement and accompanying affidavit were filed in my office on the day of the date of said statement, after the introduction and before the final passage of the ordinance or ordinances referred to in the heading of said statement.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said municipality, this 3 day of April, 1946.

J. Fred Corriher, Town Clerk of the Town of Landis, North Carolina.



MEMBER ASSOCIATED PRESS MEMBER AUDIT BUREAU OF CIRCULATIONS

No. 7510:

AN ORDINANCE AUTHORIZING THE ISSUANCE OF \$200,000 OF BONDS OF THE TOWN OF LANDIS FOR THE ESTABLISHMENT OF A SANITARY SEWER SYSTEM FOR THE TOWN OF LANDIS.

Be it ordained by the Board of Aldermen of the Town of Landis, as follows:

Section 1. The Board of Aldermen of the Town of Landis has ascert ined and hereby determines that it is necessary that said Town construct a sanitary sewer system in said Town, and that it will be necessary to expend for said purpose not less than \$200,000, in addition to moneys heretofore raised for such purpose, and that said sanitary sewer system will be entirely supported by sewerage service charges to be charged for sewerage service in accordance with a schedule to be determined and fixed by the Board of Alder-

Section 2. Said Board of Aldermen has also ascertained and hereby determines that the purpose hereinbefore described is a necessary expense of said Town within the meaning of Section 7 of Article VII of the Constitution of North Carolina, and is a purpose for which said Town may raise or appropriate money, and is not a current expense of said Town.

Section 3. In order to raise the money required for such purpose, bonds of the Town of Landis are hereby authorized and shall be issued pursuant to The Municipal Finance Act, 1921, of North Carolina. The maximum aggregate amount of bonds authorized by this ordinance shall be Two Hundred Thousand Dollars (\$200,000).

Section 4. A tax sufficient to pay the principal of and interest on said bonds shall be annually levied and collected.

Section 5. A statement of the debt of said Town has been filed with the Town Clerk of said Town, as required by said Act, and is open to public inspection.

Section 6. This ordinance shall take effect when approved by the voters of said Town at an election to be called and held as provided in said Act.

April 17, 1946

A. R. Monroe, being duly sworn says that he is the Legal Advertising manager of The Salisbury Post, a newspaper of general circulation within the county of Rowan and state of North Carolina; and that the annexed advertisement was published in The Salisbury Post in the issues of April 5 and 12, 1946.

A. R. Monroe

Sworn and subscribed to before me, this 17th day of April, 1946.

Grace O. Smith Notary Public

(My commission expires Nov. 30, 1946) April 17, 1946 The foregoing bond ordinance was passed on the 3rd day of April, 1946, and was first published on the 5th day of April, 1946.

Any action or proceeding questioning the validity of said ordinance must be commenced within thirty days after its first publication.

J. FRED CORRIHER, Town Clerk of the Town of Landis, North Carolina.



MEMBER ASSOCIATED PRESS

MEMBER ASSOCIATED PRESS

No. 7509.

AN ORDINANCE AUTHORIZING
THE ISSUANCE OF \$100,000 OF
BONDS OF THE TOWN OF
LANDIS FOR THE ESTABLISHMENT OF A WATER
SUPPLY SYSTEM FOR THE
TOWN OF LANDIS.

Be it ordained by the Board of Aldermen of the Town of Landis, as follows:

Section 1. The Board of Aldermen of the Town of Landis has ascertained and hereby determines that it is necessary that said Town construct a water supply system to supply water to said Town and its inhabitants, and that it will be necessary to expend for said purpose not less than \$100,000, in addition to moneys heretofore raised for such purpose.

Section 2. Said Board of Aldermen has also ascertained and hereby determines that the purpose hereinbefore described is a necessary expense of said Town within the meaning of Section 7 of Article VII of the Constitution of North Carolina, and is a purpose for which said Town may raise or appropriate money, and is not a current expense of said Town.

Section 3. In order to raise the money required for such purpose, bonds of the Town of Landis are hereby authorized and shall be issued pursuant to The Municipal Finance Act, 1921, of North Carolina. The maximum aggregate amount of bonds authorized by this ordinance shall be One Hundred Thousand Dollars (\$100,000).

Section 4. A tax sufficient to pay the principal of and interest on said bonds shall be annually levied and collected.

Section 5. A statement of the debt of said Town has been filed with the Town Clerk of said Town, as required by said Act, and is open to public inspection.

Section 6. This ordinance shall take effect when approved by the

MEMBER AUDIT BUREAU OF CIRCULATIONS

April 17, 1946

A. R. Monroe, being duly sworn says that he is the Legal Advertising manager of The Salisbury Post, a newspaper of general circulation within the county of Rowan and state of North Carolina; and that the annexed advertisement was published in The Salisbury Post in the issues of April 5 and 12, 1946.

A. R. Monroe Sworn and subscribed to before me, this the 17th day of April, 1946.

Grace O. Smith Notary Public

(My commission expires Nov. 30, 1946)

voters of said Town at an election to be called and held as provided in said Act.

The foregoing bond ordinance was passed on the 3rd day of April, 1946, and was first published on the 5th day of April, 1946.

Any action or proceeding questioning the validity of said ordinance must be commenced within thirty days after its first publication.

> J. FRED CORRIHER, Town Clerk of the Town of Landis, North Carolina.



MEMBER ASSOCIATED PRESS MEMBER AUDIT BUREAU OF CIRCULATIONS

No. 7512
TOWN OF LANDIS, NORTH
CAROLINA NOTICE OF NEW
REGISTRATION OF VOTERS
AND OF SPECIAL ELECTION

NOTICE IS HEREBY GIVEN that a SPECIAL ELECTION will be held in the Town of Landis, North Carolina, on the 21st day of May, 1946, for the purpose of submitting to the qualified voters of said Town, for their approval or disapproval, two bond ordinances, hereinafter described, adopted by the Board of Aldermen on the 3rd day of April, 1946, and also the indebtedness proposed to be incurred by the issuance of the bonds authorized by the ordinances. Said bond ordinances are as follows:

(I) An Ordinance entitled "An Ordinance authorizing the issuance of \$100,000 of bonds of the Town of Landis for the establishment of a water supply system for the town of Landis," authorizing the issuance of bonds of the Town of Landis of the maximum aggregate amount of \$100,000 to finance the construction of a water supply system to supply water to said Town and its inhabitants.

(2) An Ordinance entitled "An Ordinance authorizing the issuance of \$200,000 of bonds of the Town of Landis for the establishment of sanitary sewer system for the Town of Landis," authorizing the issuance of bonds of the Town of Landis of the maximum aggregate amount of \$200,000 to finance the construction of a sanitary sewer system in said Town.

May 20, 1946

A. R. Monroe, being duly sworn says that he is the Legal Advertising Manager of The Salisbury Post, a newspaper of general circulation within the county of Rowan and state of North Carolina; and that the annexed advertisement has been published in the Salisbury Post four times, issues of April 8, 1946, April 22, 1946, May 6, 1946 and May 20, 1946.

Each ordinance authorizes the levy and collection of an annual tax sufficient to pay the principal of and interest on the bonds thereby authorized.

The polls for said election will open at the hour of 6:30 o'clock, a. m., and will close at the hour of 6:30 o'clock, p. m., Eastern Standard Time. The polling place for said election shall be at OFFICE OF POLICE DEPARTMENT in the Town of Landis.

The Board of Aldermen of the Town of Landis has appointed Jeannette Stoudt to act as Registrar, and John D. Correll and R. G. Dayvault to act as Judges of Election for said election.

NOTICE IS ALSO HEREBY GIVEN, that a new registration of the qualified voters of the Town of Landis for said election has been ordered by the Board of Aldermen of said Town. The Registrar will keep open the book for new registration from 9 o'clock a. m., until 6 o'clock p. m., on each day, except Sundays and holidays, for three weeks, beginning on Monday, the 22nd day of April, 1946, and ending on Saturday, the 11th day of May, 1946, being the second Saturday before said elec-tion. On each Saturday during the registration period said book will be kept open at the polling place above named.

By order of the Board of Aldermen of the Town of Landis.

Dated, April 4th, 1946.

J. FRED CORRIHER, Town
Clerk of the Town of Landis, North Carolina.

A. R. Monroe Legal Advertising Mgr.

Sworn and subscribed to before me, this the 20th day of May, 1946.

Grace O. Smith Notary Public

(My commission expires Nov. 30, 1946)

STATE OF NORTH CAROLINA SS.:

I, J. Fred Corriher, Town Clerk of the Town of Landis, in the State of North Carolina, do hereby certify that I have compared the attached extracts from minutes with the original minutes of a special meeting of the Board of Aldermen of said Town held on the 22nd day of May, 1946, and that said extracts are a true copy of said minutes and of the whole thereof, in so far as said minutes relate to the matters mentioned and described in said extracts.

I further certify that the minutes from which said extracts have been taken have been duly recorded in the official minute book of said Board of Aldermen and appear at pages 127 to 129, inclusive, thereof, and that said extracts show all acts done or proceedings taken by said Board of Aldermen at said meeting, in any way relating to or affecting the issuance of the bonds mentioned and described in said extracts.

I further certify that the copy of the return of the special election held in said Town on May 21, 1946, which appears in the orig-

FORDHAM LOCAL GOV. H.C.B .- 32

inal minutes, is a true copy of the return which was filed in the office of the Town Clerk by the Registrar and Judges of Election appointed to hold said election on the 21st day of May, 1946, and that said copy is a true copy of said statement and of the whole thereof.

I further certify that the copy of the statement of the result of said election which appears in said original minutes is a true copy of the original statement which was prepared and signed by members of the Board of Aldermen of said Town and filed in the office of the Town Clerk on the 22nd day of May, 1946, and that said copy is a true copy of said statement and of the whole thereof.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of said Town, this 31st day of May, 1946.

J. Fred Corriber,

Town Clerk of the Town of Landis, North Carolina.

EXTRACTS FROM MINUTES OF BOARD OF ALDERMEN

A call meeting of the Board of Aldermen of the Town of Landis was held on May 22, 1946 at 7 P.M. L. A. Corriher, Mayor and all members of the Board were present as follows: P. K. Dry, Geo. Wright, J. U. Alexander and J. F. Lipe. The following resolution pertaining to the election held on May 21, 1946 for water and sewer bonds was adopted.

The Town Clerk presented the return showing the result of the Special Election held in the Town on the 21st day of May, 1946, filed by the Registrar and Judges of Election appointed to hold the election, and the return was read and considered.

J. F. Lipe moved that the following resolution be adopted:

"Whereas, the officers appointed to hold the Special Election held in the Town of Landis on the 21st day of May, 1946, have held said election and have made a return of the result thereof which reads as follows:

Return of Special Election held in the Town of Landis on the 21st day of May, 1946.

WE, the undersigned, Jeannette Stoudt, John D. Carrell and R. G. Dayvault, being the Registrar and Judges of Election appointed to hold the special election in the Town of Landis, in the State of North Carolina, on the 21st day of May, 1946, do hereby certify as follows:

1. The polls for said election were opened at the Office of the Police Department in said Town on the 21st day of May, 1946, at the hour of 6:30 o'clock, A.M. (Eastern Standard Time) and were

continuously kept open at said place until the hour of 6:30 o'clock P.M. (Eastern Standard Time) on said day.

- 2. Only persons who had been duly registered were permitted to vote at said election. The total number of voters who were registered and qualified to vote at said election was 445.
- 3. All persons voting at said election were required to use ballots in the form prescribed by the resolution adopted by the Board of Aldermen of said Town on April 3, 1946 and bearing the facsimile signature of J. Fred Corriher, Town Clerk.
- 4. The total number of votes cast for Proposition No. 1 set forth in said ballots was 267. The total number of votes cast against said proposition was 6.
- 5. The total number of votes cast for Proposition No. 2 set forth in said ballots was 262. The total number of votes cast against said proposition was 7.

In Witness Whereof, we have hereunto set our hands for the purpose of making a return of the result of said election to the Board of Aldermen of said Town of Landis, this 22 day of May, 1946.

Jeannette Stoudt,
Registrar
R. G. DayValt,
Judge of Election
J. D. Correll,
Judge of Election

and

Whereas, the Board of Aldermen has considered and canvassed the return: Now, Therefore,

Be It Resolved by the Board of Commissioners of the Town of Landis that it be and hereby is determined and declared that the number of voters registered and qualified to vote at said election was 445.

Further Resolved that the number of votes cast at said election for the ordinance entitled "An Ordinance authorizing the issuance of \$100,000 of bonds of the Town of Landis for the establishment of a water supply system for the Town of Landis", adopted by the Board of Aldermen on the 3rd day of April, 1946, and for the proposed indebtedness to be incurred pursuant to said ordinance was 267, and that the number of votes cast at said election against said ordinance and against said proposed indebtedness was 6, and that a majority of the voters qualified to vote and voting at said election voted to approve said ordinance and said proposed indebtedness.

Further Resolved that the number of votes cast at said election for the ordinance entitled "An Ordinance authorizing the issuance of \$200,000 of bonds of the Town of Landis for the establishment of a sanitary sewer system for the Town of Landis", adopted by the Board of Aldermen on the 3rd day of April, 1946, and for the proposed indebtedness to be incurred pursuant to said ordinance was 262, and that the number of votes cast at said election against said ordinance and against said proposed indebtedness was 7, and that a majority of the voters qualified to vote and voting at said election voted to approve said ordinance and said proposed indebtedness.

Further Resolved that a statement showing the number of votes cast for and against each of said ordinances and said proposed indebtedness, the number of voters qualified to vote at said election, and declaring the result of said election, shall be prepared and signed by at least a majority of the members of the Board."

P. K. Dry seconded the motion, and the motion was adopted, Aldermen Geo. Wright, J. U. Alexander, J. F. Lipe and P. K. Dry voting for the motion and no one voting against it.

The members of the Board of Aldermen voting for the adoption of the above resolution thereupon signed a statement of the result of the election and delivered the statement so signed to the Town Clerk. For the purpose of recording the statement as required by law the following copy of the statement so signed is inserted in the minutes:

STATEMENT OF RESULT OF SPECIAL ELECTION HELD IN THE TOWN OF LANDIS ON MAY 21, 1946

Whereas, by direction of the Board of Aldermen of the Town of Landis, in the State of North Carolina, a special election was duly called and held in said Town on May 21, 1946, for the purpose of submitting to the qualified voters of said Town the following propositions:

PROPOSITION NO. 1

Shall the qualified voters of the Town of Landis approve the ordinance adopted by the Board of Aldermen of said Town on April 3rd, 1946, entitled "An Ordinance authorizing the issuance of \$100,000 of bonds of the Town of Landis for the establishment of a water supply system for the Town of Landis", which ordinance authorizes the issuance of bonds of said Town of the maximum aggregate amount of \$100,000 to finance the construction of a water supply system to supply water to said Town and its inhabitants, and authorizes the levy of a tax sufficient to pay the principal of and interest on said bonds; and also approve the indebtedness to be incurred by the issuance of said bonds?

PROPOSITION NO. 2

Shall the qualified voters of the Town of Landis approve the ordinance adopted by the Board of Aldermen of said Town on April 3rd, 1946, entitled "An Ordinance authorizing the issuance of \$200,000 of bonds of the Town of Landis for the establishment of a sanitary sewer system for the Town of Landis", which ordinance authorizes the issuance of bonds of said Town of the maximum aggregate amount of \$200,000 to finance the construction of a sanitary sewer system in said Town, and authorizes the levy of a tax sufficient to pay the principal of and interest on said bonds; and also approve the indebtedness to be incurred by the issuance of said bonds?

and said Board of Aldermen has duly canvassed the returns of the Registrar and Judges of Election appointed to hold said election and has determined the result of said election to be as hereinafter stated: Now, Therefore,

Said Board of Aldermen hereby makes the following statement of the result of said special election, pursuant to the Municipal Finance Act of North Carolina:

- (1) The number of voters registered and qualified to vote at said election was 445.
- (2) The number of votes cast at said election for the ordinance described in Proposition No. 1 and for the indebtedness proposed to be incurred by the issuance of the bonds authorized by said ordinance was 267. The number of votes cast at said election against said ordinance and against said indebtedness was 6. A majority of the voters qualified to vote and voting at said election voted to approve said ordinance and said indebtedness.
- (3) The number of votes cast at said election for the ordinance described in Proposition No. 2 and for the indebtedness proposed to be incurred by the issuance of the bonds authorized by said ordinance was 262. The number of votes cast at said election against said ordinance and against said indebtedness was 7. A majority of the voters qualified to vote and voting at said election voted to approve said ordinance and said indebtedness.

In Witness Whereof, we, the undersigned members of the Board of Aldermen of the Town of Landis, have hereunto set our hands, this 22 day of May, 1946.

P. K. Dry,
J. U. Alexander,
L. A. Corriher, Mayor,
J. F. Lipe,
Geo. W. Wright,
Members, Board of Aldermen

- P. K. Dry moved that the Town Clerk be directed to file the original statement signed by the members of the Board of Aldermen in his office and to publish a copy of the statement in the manner provided by law.
- J. U. Alexander seconded the motion, and the motion was adopted, Aldermen Geo. Wright, J. U. Alexander, J. F. Lipe and P. K. Dry, voting for the motion and no one voting against it.

Meeting adjourned subject to the call of the Mayor.

L. A. Corriher, Mayor J. Fred Corriher, Clerk



MEMBER ASSOCIATED PRESS MEMBER AUDIT BUREAU OF CIRCULATIONS

No. 7546.

STATEMENT OF RESULT OF SPECIAL ELECTION HELD IN THE TOWN OF LANDIS ON MAY 21, 1946.

Whereas, by direction of the Board of Aldermen of the Town of Landis, in the State of North Carolina, a special election was duly called and held in said Town on May 21, 1946, for the purpose of submitting to the qualified voters of said Town the following propositions:

PROPOSITION NO. 1

Shall the qualified voters of the Town of Landis approve the ordinance adopted by the Board of Aldermen of said Town on April 3rd, 1946, entitled "An Ordinance authorizing the issuance of \$100,000 of bonds of the Town of Landis for the establishment of a water supply supply system for the Town of Landis," which ordinance authorizes the issuance of bonds of said Town to the maximum aggregate amount of \$100,000 to finance the construction of a water supply system to supply water to said Town and its inhabitants, and authorizes the levy of a tax sufficient to pay the principal of and interest on said bonds; and also approve the indebtedness to be incurred by the issuance of said

PROPOSITION NO. 2 Shall the qualified voters of the Town of Landis approve the ordinance adopted by the Board of Aldermen of said Town on April 3rd, 1946, entitled "An Ordinance authorizing the issuance of \$200.

May 27, 1946

A. R. Monroe, being duly sworn says that he is the Legal Advertising Manager of The Salisbury Post, a newspaper of general circulation within the county of Rowan and state of North Carolina; and that the annexed advertisement was published one time in

000 of bonds of the Town of Landis for the establishment of a sanitary sewer system for the Town of Landis," which ordinance authorizes the issuance of bonds of said Town of the maximum aggregate amount of \$200,000 to finance the construction of a sanitary sewer system in said Town, and authorizes the levy of a tax sufficient to pay the principal of and interest on said bonds; and also approve the indebtodness to be incurred by the issuance of said bonds?

and said Board of Aldermen has duly canvassed the returns of the Registrar and Judges of Election appointed to hold said election and has determined the result of said election to be as hereinafter stated. Now, Therefore,

Said Board of Aldermen hereby makes the following statement of the result of said special election, pursuant to the Municipal Finance Act of North Carolina:

(1) The number of voters registered and qualified to vote at said election for 445.

(2) The number of votes cast at said election for the ordinance described in Proposition No. 1 and for the indebtedness proposed to be incurred by the issuance of the bonds authorized by said ordinance was 267. The number of votes cast at said election against said ordinance and against said indebtedness was 6. A majority of the voters qualified to vote and voting at said election voted to approve said ordinance and said indebtedness.

(3) The number of votes cast at said election for the ordinance described in Proposition No. 2 and for the indebtedness proposed to be incurred by the issuance of the bonds authorized by said ordinance was 262. The number of votes cast at said election against said ordinance and against said indebtedness was 7. A majority of the voters qualified to vote and voting at said election voted to approve said ordinance and said indebtedness.

In witness whereof, we, the undersigned members of the Board of Aldermen of the Town of Landis, have hereunto set our hands, this 22 day of May, 1946.

P. K. DRY, J. U. ALEXANDER,

P. F. LIPE,

GEO. W. WRIGHT,

L. A. CORRIHER, Mayor, Members, Board of Aldermen.

P. K. Dry moved that the Town Clerk be directed to file the original statement signed by the members of the Board of Aldermen in his office and to publish a copy of the statement in the manner provided by law.

J. U. Alexander seconded the motion, and the motion was adopted, Aldermen Geo. Wright, J. U. The Salisbury Post on May 26, 1946.

A. R. Monroe

Sworn and subscribed to before me, this the 27th day of May, 1946.

Grace O. Smith Notary Public

(My commission expires Nov. 30, 1946) Alexander, J. F. Lipe and J. K. Dry voting for the motion and no one voting against it.

Meeting adjourned subject to the call of the Mayor.

STATE OF NORTH CAROLINA COUNTY OF ROWAN ss.

Jeannette Stoudt, being duly sworn, deposes and says:

- 1. I am the person designated by the Board of Aldermen of the Town of Landis, in the State of North Carolina, to act as Registrar at the special election held in said Town on the 21st day of May, 1946.
- 2. In accordance with the resolution adopted by the Board of Aldermen of said Town on the 3rd day of April, 1946, I opened the Registration Book for said election on Monday, April 22, 1946, and I kept said book open each day thereafter (Sundays and holidays excepted) until six o'clock, P. M., on Saturday, May 11, 1946. I kept said book open on each day during said period from 9 o'clock, A. M. to 6 o'clock, P. M. On each Saturday during such period, said book was kept open at the office of the Police Department of said Town and on every other day during said period I kept said book open at my residence in said Town.
- 3. The polls for said election were opened at the hour of 6.30 o'clock, A. M., and closed at the hour of 6.30 o'clock, P. M., Eastern Standard Time, on May 21, 1946, at the office of the Police Department in said Town.
- 4. Attached hereto is a fac-simile of the ballot used in said election.
- 5. The total number of voters who registered for said election was 445.

Jeannette Stoudt

Sworn to before me, this 7 day of June, 1946.

Notary Public, Rowan County My Commission Expires May 27, 1947

OFFICIAL BALLOT

BOND ISSUE TOWN OF LANDIS

- (1) To vote "YES" on any question, make a cross (X) mark in the square to the right of the word "YES."
- (2) To vote "NO" on any question, make a cross (X) mark in the square to the right of the word "NO."

NO

(3) If you tear or deface or wrongly mark this ballot, return it and get another.

PROPOSITION NO. 1

SHALL the qualified voters of the Town of Landis approve the ordinance adopted by the Board of Aldermen of said Town on April 3rd, 1946, entitled "An Ordinance authorizing the issuance of \$100,000 of bonds YES of the Town of Landis for the establishment of a water supply system for the Town of Landis," which ordinance authorizes the issuance of bonds of said Town of the maximum aggregate amount of \$100,000 to finance the construction of a water supply system to supply water to said Town and its inhabitants, and authorizes the levy of a tax sufficient to pay the principal of and interest on said bonds: and also approve the indebtedness to be incurred by the issuance of said bonds?

PROPOSITION NO. 2

SHALL the qualified voters of the Town of Landis approve the ordinance adopted by the Board of Aldermen of said Town on April 3rd, 1946, entitled "An Ordinance authorizing the issuance of \$200,000 of bonds of the Town of Landis for the establishment of a sanitary sewer system for the Town of Landis," which ordinance authorizes the issuance of bonds of said Town of the maximum aggregate amount of \$200,000 to finance the construction of a sanitary sewer system in said Town, and authorizes the levy of a tax sufficient to pay the principal of and interest on said bonds; and also approve the indebtedness to be incurred by the issuance of said bonds?

> J. Fred Corriber Fac-simile signature of Town Clerk.

YES

NO



STATE OF NORTH CAROLINA TOWN OF LANDIS ss.:

I, J. Fred Corriher, Town Clerk of the Town of Landis, in the State of North Carolina, do hereby certify that the last regular municipal election held in said Town was held on the 21st day of May, 1946, and that the time fixed by law for the holding of the next regular municipal election to be held in said Town is the 6 day of May, 1947.

In Witness Whereof, I have hereunto set my hand and have hereunto affixed the corporate seal of said Town of Landis, this 7th day of June, 1946.

J. Fred Corriher, Town Clerk

EXTRACTS FROM MINUTES OF BOARD OF ALDERMEN

A call meeting of the Town Board of the Town of Landis was held on June 10th, at 8:30 A.M. L. A. Corriher Mayor and all members of the Board were present as follows: Geo. W. Wright, J. F. Lipe, P. K. Dry and J. U. Alexander. The following resolution pertaining to the issuance of Water & Sewer bonds and maturities of said bonds.

L. A. Corriher, Mayor J. Fred Corriher, Town Clerk

P. K. Dry moved that the following resolution be adopted:

"Whereas, the Board of Aldermen of the Town of Landis has duly adopted each of the ordinances hereinafter described for the purpose of authorizing the issuance of bonds of said Town; and the Board of Aldermen desires to make further provision for the issuance of said bonds: Now, Therefore,

Be It Resolved by the Board of Aldermen of the Town of Landis as follows:

Section 1. Pursuant to the provisions of The Municipal Finance Act, 1921, of North Carolina, as amended, it is hereby determined and declared that the probable period of usefulness of the improvement for which bonds are authorized to be issued by the ordinance entitled "An Ordinance authorizing the issuance of \$100,000 of bonds of the Town of Landis for the establishment of a water supply system for the Town of Landis" adopted by the Board of Aldermen on the 3rd day of April, 1946, is forty years, computed from June 1, 1946. There shall be issued, pursuant to said ordinance, bonds of the Town of Landis of the aggregate principal amount of \$100,000.

Section 2. Pursuant to the provisions of The Municipal Finance Act, 1921, of North Carolina, as amended, it is hereby determined and declared that the probable period of usefulness of the improvement for which bonds are authorized to be issued by the ordinance entitled "An Ordinance authorizing the issuance of \$200,000 of bonds of the Town of Landis for the establishment of a sanitary sewer system for the Town of Landis", adopted by the Board of Aldermen on the 3rd day of April, 1946, is forty years, computed from June 1, 1946. There shall be issued, pursuant to said ordinance, bonds of the Town of Landis of the aggregate principal amount of \$200,000.

Section 3. Pursuant to the provisions of The Municipal Finance Act, 1921, of North Carolina, as amended, it is hereby determined and declared that the average of said probable periods of usefulness determined and declared in Section 1 and Section 2 of this resolution, taking into consideration the amount of bonds to be issued on account of each purpose described in said sections, is forty years, computed from June 1, 1946. The bonds to be issued pursuant to said ordinances described in Section 1 and Section 2 shall be issued as one consolidated bond issue of the aggregate principal amount of \$300,000, and shall be designated "Water and Sewer Bonds".

Section 4. Said bonds shall consist of three hundred bonds of the denomination of \$1,000 each, and shall be numbered from 1 to 300, inclusive, in the order in which they mature, and shall be dated June 1, 1946. Each of said bonds shall bear interest from its date until said bonds shall be paid at a rate which shall not exceed six per centum (6%) per annum, and such interest shall be payable semi-annually on each June 1st and December 1st subsequent to the date of said bond. Said bonds shall mature serially, six bonds on June 1st in each of the years 1949 to 1958, inclusive, eight bonds on June 1st in each of the years 1959 to 1963, inclusive, nine bonds on June 1st in each of the years 1964 to 1971, inclusive, ten bonds on June 1, 1972, eleven bonds on June 1, 1973. twelve bonds on June 1, 1974, thirteen bonds on June 1st in each of the years 1975 to 1977, inclusive, and fourteen bonds on June 1st in each of the years 1978 to 1981, inclusive, without option to the Town of prior redemption.

Section 5. Said bonds shall be coupon bonds and shall be registerable at the option of the holder as to principal only. Said bonds shall be signed by the Mayor and by the Town Clerk of said Town, and the corporate seal of said Town shall be affixed to each of said bonds. The coupons to be attached to said bonds shall bear the lithographed or engraved fac-simile signature of said Town Clerk.

Section 6. Each of said bonds shall be in substantially the following form:

No. —

UNITED STATES OF AMERICA STATE OF NORTH CAROLINA COUNTY OF ROWAN TOWN OF LANDIS

WATER AND SEWER BOND

\$1,000

The Town of Landis, a municipal corporation of the State of North Carolina, located in the County of Rowan in said State, for value received hereby promises to pay to the bearer of this bond, or, if it be registered, then to the registered owner, the principal sum of

ONE THOUSAND DOLLARS (\$1,000)

This bond may be registered as to principal only by the holder in his name on the bond register of said Town kept in the office of the Bond Registrar of said Town, and such registration shall be noted hereon by said Bond Registrar. If so registered, this bond may be transferred on said Bond register by the registered owner in person or by attorney, upon presentation of this bond to the Bond Registrar with a written instrument of transfer in a form approved by said Bond Registrar and executed by said registered owner. If this bond be so registered, the principal shall thereafter be payable only to the person in whose name it is registered, unless this bond shall be discharged from registry by being registered as payable to bearer. Such registration shall not affect the negotiability of the coupons, which shall continue to pass by delivery.

This bond is issued pursuant to The Municipal Finance Act, 1921, of North Carolina, as amended, and ordinances duly adopted by the Board of Aldermen of said Town, to finance the cost of

constructing a water supply system to supply water to said Town and its inhabitants and a sewer system for said Town. The issuance of this bond and the contracting of the indebtedness evidenced thereby have been approved by a majority of the qualified voters of said Town voting at an election duly called and held in said Town on the 21st day of May, 1946.

It is hereby certified and recited that all conditions, acts and things required by the Constitution or statutes of the State of North Carolina to exist, be performed or happen precedent to or in the issuance of this bond, exist, have been performed and have happened, and that the amount of this bond, together with all other indebtedness of said Town, is within every debt and other limit prescribed by said Constitution or statutes. The faith and credit of said Town are hereby pledged to the punctual payment of the principal of and interest on this bond in accordance with its terms.

In Witness Whereof, said Town has caused this bond to be signed by its Mayor and by its Town Clerk, and the corporate seal of said Town to be hereunto affixed, and the annexed coupons to bear the fac-simile signature of said Town Clerk, and this bond to be dated June 1, 1946.

L. A. Corriher,

Mayor
J. Fred Corriher,

Town Clerk

Section 7. Each of the interest coupons to be attached to said bonds shall be in substantially the following form:

No.— \$1000.00

June.

On the 1st day of December, 1946, the Town of Landis, North Carolina, will pay to bearer

One Thousand Dollars (\$1000.00)

at the principal office of The Chase National Bank of the City of New York, in the Borough of Manhattan, City and State of New York, in any coin or currency of the United States of America which at the time of payment is legal tender for the payment of public and private debts, being the semi-annual interest then due on its Water and Sewer Bond, dated June 1, 1946, and numbered 1 to 300.

J. Fred Corriber, Town Clerk Section 8. There shall be endorsed upon each of said bonds provisions for the registration of said bonds as to principal only, in substantially the following form:

The within bond has been registered as to principal only, as follows:

Date of Registration	Name of Registered Holder	Signature of Bond Registrar	

Section 9. There shall appear upon each of said bonds a certificate for the use of the Secretary of the Local Government Commission, in substantially the following form:

The issue hereof has been approved under the provisions of the Local Government Act.

1	W. E. Easterling,
Secretary of the L	ocal Government Commission
Ву ———	***************************************
	Designated Assistant

Section 10. The Town Treasurer is hereby authorized and directed to provide a suitable bond register for the registration of said bonds and to act as Bond Registrar in registering said bonds and to carry out the provisions set forth in said bonds for the conversion of said bonds into registered bonds and for the transfer thereof.

Section 11. The Local Government Commission of North Carolina is hereby requested to sell said bonds in the manner prescribed by the Local Government Act of North Carolina, and to state in the notice of the sale of said bonds given pursuant to Section 17 of said Act, that bidders may name one rate of interest for part of said bonds and another rate or rates for the balance of said bonds. Said bonds shall bear interest at such rate or rates as may be named in the proposal to purchase said bonds which shall be accepted by said Local Government Commission in accordance with said Act.

Section 12. The Mayor and Town Clerk are hereby authorized and directed to cause said bonds to be prepared and, when they shall have been duly sold by said Local Commission, to execute said bonds and to turn said bonds over to the State Treasurer of North Carolina, for delivery to the purchaser or purchasers to whom they may be sold by said Commission."

J. F. Lipe seconded the motion, and the motion was adopted. Those voting for the motion were Messrs. Geo. W. Wright, J. F.

Lipe, P. K. Dry, J. U. Alexander, L. A. Corriher, Mayor. No one voted against it.

J. F. Lipe moved that meeting adjourn subject to the call of the mayor, seconded by J. U. Alexander. Motion carried.

STATE OF NORTH CAROLINA TOWN OF LANDIS

I, J. Fred Corriher, Town Clerk of the Town of Landis, in the State of North Carolina, do hereby certify that I have compared the attached extracts from minutes with the original minutes of a call meeting of the Board of Aldermen of said Town held on the 10th day of June, 1946, and that said extracts are a true copy of said minutes and of the whole thereof, in so far as said minutes relate to the matters mentioned and described in said extracts.

I further certify that the minutes from which said extracts have been taken have been duly recorded in the official minute book of said Board of Aldermen and appear at pages 132 to 136, inclusive, thereof, and that said extracts show all acts done or proceedings taken by said Board of Aldermen at said meeting, in any way relating to or affecting the issuance of the bonds mentioned and described in said extracts.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of said Town this 10th day of June, 1946.

J. Fred Corriher,

Town Clerk of the Town of Landis, North Carolina.



MEMBER ASSOCIATED PRESS MEMBER AUDIT BUREAU OF CIRCULATIONS

NOTICE OF SALE OF BONDS \$300,000 TOWN OF LANDIS, NORTH CAROLINA WATER AND SEWER BONDS Sealed bids will be received until 11 o'clock a. m., Eastern Standard Time, October 8, 1946, by the undersigned at its office in the City of Raleigh, N. C., for \$300,000 Water and Sewer Bonds of the Town of Landis, N. C., dated June 1, 1946, and maturing annually on June 1 \$6,000 1949 to 1958, \$8,000 1959 to 1963, \$9,000 1964 to 1971, all inclusive, \$10,000 1972, \$11,000 1973, \$12,000 1974, \$13,000 1975 to 1977, all inclusive, and \$14,000 1978 to 1981, all inclusive, without option of prior payment. There will be no auction. Denomination \$1,000; principal and semiannual (J & D 1) interest payable in lawful money in New York City; coupon bonds registerable as to principal only; general obligations; unlimited tax; delivery at place of purchaser's choice.

Bidders are requested to name the interest rate or rates, not exceeding six per cent per annum in multiples of one-fourth of one per cent. Each bid may name one rate for part of the bonds (having the earliest maturities), and another rate or rates for the balance, but no bid may name more than four rates, and each bidder must specify in his bid the amount of bonds of each rate. Each rate must be bid for bonds of consecutive maturities. The bonds will be awarded to the bidder offering to purchase the bonds at the lowest interest cost to the Town, such cost to be determined by deducting the total amount of the premium bid from the aggregate amount of interest upon all of the bonds until their respective maturities. No bid of less than par and accrued interest will be entertained.

Bids must be enclosed in a sealed envelope marked "Proposal for Bonds" and be accompanied by a certified check upon an incorporated bank or trust company, payable unconditionally to the order of the State Treasurer of North Carolina for \$6,000. The right to reject all bids is reserved. The approving opinion of Messrs. Reed, Hoyt & Washburn, New York City, will be furnished the purchaser.

In the event that prior to the delivery of the bonds the income received by private holders from bonds of the same type and character shall be taxable by the terms of any Federal income tax law, the successful bidder may, at his election, be relieved of his obligations under the contract to purchase the bonds and, in such case, the deposit accompanying his bid will be returned.

LOCAL GOVERNMENT COM-MISSION, By W. E. Easterling, Secretary of the Commission,

October 12, 1946

A. R. Monroe, being duly sworn says that he is The Legal Advertising Manager of the Salisbury Post, a newspaper of general circulation within the county of Rowan, and state of North Carolina; and that the annexed advertisement was published in The Salisbury Post in the issue of Sept. 26, 1946 and October 3, 1946.

A. R. Monroe Legal Adv. Manager

Sworn and subscribed to before me, this the 12th day of October, 1946.

Grace O. Smith Notary Public

(My commission expires Nov. 30, 1946)

STATE OF NORTH CAROLINA SS.:

I, J. Fred Corriher, Town Clerk of the Town of Landis, in the State of North Carolina, do hereby certify that I have compared the attached extracts from minutes with the original minutes of a call meeting of the Board of Aldermen of said Town held on the 14th day of October, 1946, and that said extracts are a true copy

of said minutes and of the whole thereof, in so far as said minutes relate to the matters mentioned and described in said extracts.

I further certify that the minutes from which said extracts have been taken have been duly recorded in the official minute book of said Board of Aldermen and appear at pages 113 to 117, inclusive. thereof, and that said extracts show all acts done or proceedings taken by said Board of Aldermen at said meeting, in any way relating to or affecting the issuance of the bonds mentioned and de-

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of said Town this 14th day of October, 1946.

scribed in said extracts.

J. Fred Corriber.

Town Clerk of the Town of Landis, North Carolina.

EXTRACTS FROM MINUTES OF BOARD OF ALDERMEN

A call meeting of the Town Board was held on October 14th, at 7 o'clock A.M. L. A. Corriber Mayor presided. All the members of the Board were present as follows: J. F. Lipe, P. K. Dry, Geo. Wright and J. U. Alexander. The following resolutions pertaining to the sale of Water and Sewer Bonds was adopted.

J. Fred Corriher,

Clerk

J. F. Lipe moved that the following resolution be adopted:

"Whereas, the Local Government Commission of North Carolina, has reported to the Board of Aldermen that the Local Government Commission has sold the bonds, hereinafter described, in accordance with law and that the award made contemplates that the bonds shall bear interest as hereinafter provided: Now. Therefore.

Be It Resolved by the Board of Aldermen of the Town of Landis that the \$54,000 Water and Sewer Bonds, numbered from 1 to 54, inclusive, to be issued pursuant to the bond ordinances adopted by the Board of Aldermen on April 3, 1946, shall bear interest at the rate of two and three-quarters per centum (2\%\%) per annum, and that the remaining \$246,000 Water and Sewer Bonds, numbered from 55 to 300, inclusive, to be issued pursuant to said bond ordinances shall bear interest at the rate of three per centum (3%) per annum."

J. U. Alexander seconded the motion, and the motion was adopted. Those voting for the motion were Messrs. J. F. Lipe, P. K. Dry, Geo. Wright, J. U. Alexander, L. A. Corriher. No one voted against it.

Meeting was adjourned subject to the call of the mayor.

L. A. Corriber, Mayor

J. Fred Corriber.

Clerk

STATE OF NORTH CAROLINA LOCAL GOVERNMENT COMMISSION RALEIGH

I, W. E. Easterling, Secretary of the Local Government Commission of North Carolina, do hereby certify that the following is a true copy of an extract from the minutes of a regular meeting of the Executive Committee of said Commission held on the 14th day of May 1946, at which meeting a quorum was present:

TOWN OF LANDIS

FILE #1947-B

\$300,000 Water and Sewer Bonds

Application was presented requesting approval of the issuance of \$300,000 of bonds of the Town of Landis authorized by ordinances passed by the Board of Aldermen of said Town on the 3rd day of April 1946 and entitled "AN ORDINANCE AUTHORIZ-ING THE ISSUANCE OF \$100,000 OF BONDS OF THE TOWN OF LANDIS FOR THE ESTABLISHMENT OF A WATER SUP-PLY SYSTEM FOR THE TOWN OF LANDIS" and "AN ORDI-NANCE AUTHORIZING THE ISSUANCE OF \$200,000 OF BONDS OF THE TOWN OF LANDIS FOR THE ESTABLISH-MENT OF A SANITARY SEWER SYSTEM FOR THE TOWN OF LANDIS". After discussion Mr. Eure made the motion that issuance of the \$100,000 of bonds of the Town of Landis for the establishment of a water supply system and of \$200,000 of bonds of said Town for the establishment of a sanitary sewer system be approved. The motion was seconded by Mr. Pou and was passed by unanimous vote.

Thereupon, the Secretary was directed to advise officers of the Town that the bonds shall be advertised for sale when contractors' bids have been received by the Town for construction of the water system and sewer system and evidence is furnished him by the Town that such bids have been received and the low bids are within the amount of the bonds authorized.

I Further Certify that no request for a review of the action taken by said Executive Committee in the foregoing extract has been made to said Committee or Commission.

Witness my hand at Raleigh this 2nd day of November, 1946.

W. E. Easterling,
Secretary Local Government Commission

STATE OF NORTH CAROLINA TOWN OF LANDIS ss.:

I, J. Fred Corriher, Town Clerk of the Town of Landis, in the State of North Carolina, do hereby certify that the Board of Aldermen of said Town has never adopted any ordinances or resolutions or rules regulating in any way the procedure to be followed or observed by said Board in the conduct of its meetings or the transaction of its business or the adoption of ordinances or resolutions or other proceedings.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of said Town of Landis, this 17th day of October, 1946.

> J. Fred Corriher, Town Clerk of the Town of Landis, North Carolina.

STATE OF NORTH CAROLINA SS.:

- I, J. Fred Corriher, Town Clerk of the Town of Landis, in the State of North Carolina, do hereby certify as follows:
- 1. No newspaper has been printed or published within the corporate limits of said Town at any time since the 1st day of January, 1940.
- 2. The newspaper known as "The Post" has been regularly printed and published in the City of Salisbury, in the County of Rowan, in the State of North Carolina, for more than thirty-five years. Said newspaper has circulated in said Town at all times since the 1st day of January, 1940.
- 3. All the territory included in said Town is within the boundaries of said County.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of said Town of Landis, this 17th day of October, 1946.

> J. Fred Corriher, Town Clerk of the Town of Landis, North Carolina.

STATE OF NORTH CAROLINA COUNTY OF ROWAN ss.:

I, Paul A. Swicegood, Clerk of the Superior Court of the County of Rowan, in the State of North Carolina, do hereby certify that I have compared the attached copy of sworn statement with the original sworn statement filed in the office of said Clerk on the 22nd day of February, 1946, pursuant to Chapter 170 of the Public Laws of 1939 of North Carolina, by the newspaper known as "The Post", which newspaper is published in Salisbury

in said County, and that said copy is a true copy of said sworn statement and of the whole thereof.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Superior Court this 17th day of October, 1946.

Paul A. Swicegood.

Clerk of the Superior Court of the County of Rowan, North Carolina.

STATE OF NORTH CAROLINA COUNTY OF ROWAN ss.:

- P. G. Laughridge, being duly sworn, deposes and says:
- 1. I reside in the City of Salisbury, in the State of North Carolina, and have been employed by the publishers of "The Post", a newspaper published in said City for more than 21 years and am familiar with the distribution of said newspaper to its inhabitants and readers.
- 2. Said newspaper has been regularly and continuously printed, published and issued in the City of Salisbury, in the County of Rowan, and State of North Carolina, at least one day in each calendar week since the 1st day of January, 1939.
- 3. Prior to the 1st day of January, 1939, said newspaper was duly entered as second class mail matter under the postal laws and regulations of the United States and such entry has never been rescinded, cancelled or revoked. At all times since such entry said newspaper has been admitted to the United States mails as second class matter at said City of Salisbury.
- 4. At all times since the 1st day of January, 1939, said newspaper has been a newspaper with a general circulation to actual paid subscribers. Each issue of said newspaper, during such period, was distributed to not less than 10,000 actual paid subscribers. The circulation of each issue of said newspaper, during such period, including such actual paid subscribers, was not less than 10,000.
- 5. At all times since the 1st day of January, 1939, said newspaper has circulated in the Town of Landis, in the State of North Carolina. Each issue of said newspaper, during such period, was distributed to not less than 200 actual paid subscribers who resided in said Town.

P. G. Laughridge

Sworn to before me, this 22 day of February, 1946. Grace O. Smith, Notary Public (Notarial Seal)

My Commission Expires Nov. 30, 1946.

STATE OF NORTH CAROLINA COUNTY OF ROWAN ss.:

A. R. Monroe, being duly sworn, deposes and says:

- 1. I am now and have been since the 15th day of August, 1934 the Legal Advertising Manager of the newspaper known as the "Salisbury Post".
- 2. Said newspaper has been issued at least once in each calendar week since January 1, 1945. Each issue of said newspaper, during such period, was printed in the City of Salisbury in the County of Rowan and was published and issued in said City. At all times during such period, such newspaper had a general circulation to actual paid subscribers. Each issue of said newspaper, during such period, was distributed to not less than 338 actual paid subscribers residing within said Town of Landis in said County.
- 3. Prior to the 1st day of January, 1945, said newspaper was duly entered as second class mail matter under the postal laws and regulations of the United States at the post office of the United States in said City of Salisbury and such entry has never been rescinded, cancelled or revoked. At all times since such entry said newspaper has been admitted to the United States mails as second class matter at the said post office in said City.

A. R. Monroe.

Sworn to before me this 25th day of October, 1946.

Grace O. Smith, Notary Public My Commission Expires No. 30, 1946

STATE OF NORTH CAROLINA TOWN OF LANDIS

I, J. Fred Corriher, Town Clerk of the Town of Landis, in the State of North Carolina, do hereby certify that I have examined the minutes of the Board of Aldermen of said Town as said minutes have been recorded in the official minute book of said Board of Aldermen, and I find that said minutes show no acts to have been done or proceedings to have been taken by said Board of Aldermen which in any way affect or relate to the issuance of the \$300,000 Water and Sewer Bonds of said Town dated June 1, 1946, which are authorized to be issued by the ordinances adopted by said Board of Aldermen on the 3rd day of April, 1946, other than the acts done and proceedings taken by said Board of Aldermen at the meetings of said Board of Aldermen held on the 3rd day of April, 1946, the 22nd day of May, 1946, the 10th day of June, 1946 and the 14th day of October, 1946.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of said Town of Landis, this 17th day of October, 1946.

J. Fred Corriber,

Town Clerk of the Town of Landis, North Carolina.

ATTORNEY'S CERTIFICATE

To enable Messrs. Reed, Hoyt & Washburn, of New York City, to examine into and pass upon the validity of the obligations hereinafter referred to, I hereby certify to them as follows:

1. The Town of Landis, a public corporation of the State of North Carolina, proposes to issue the following obligations of such public corporation, viz.:

\$300,000 Water and Sewer Bonds dated June 1, 1946, authorized by ordinances and resolutions adopted by the Board of Aldermen of said Town on April 3, 1946, May 22, 1946, June 10, 1946 and October 14, 1946.

- 2. I have examined the proceedings hereinbefore described and I have considered other satisfactory evidence submitted to me, and it is my opinion that all conditions, acts and things required by the Constitution and statutes of such State to exist, be performed or happen precedent to the issuance of such obligations exist, have been performed and have happened and that such obligations, if executed and issued in accordance with such proceedings, will be valid and legally binding obligations of such public corporation.
- 3. I have made reasonable inquiry and I am satisfied that no litigation is now pending or threatened either (1) to restrain or enjoin the issuance or delivery of such obligations or (2) to question in any manner the authority of such public corporation to issue or the issuance or validity of any proceedings authorizing such obligations or the levy or collection of taxes to pay such obligations; and that neither the corporate existence or the boundaries nor the title of any of the officers of such public corporation to their respective offices is being contested.

Dated, October 17, 1946.

T. G. Furr,

STATE OF NORTH CAROLINA, ss.:

- I, W. E. Easterling, Secretary of the Local Government Commission of North Carolina, do hereby certify as follows:
- 1. The Executive Committee of said Local Government Commission at a meeting of said Committee duly called and held on the 14 day of May, 1946, and attended by at least three (3) members of said Committee, duly adopted a resolution approving the

issuance of the bonds of the Town of Landis, North Carolina, described in the following schedule:

SCHEDULE

\$300,000 Water and Sewer Bonds, Nos. 1 to 300, inclusive, in the denomination of \$1,000 each, dated June 1, 1946 and maturing annually on June 1st \$6,000 1949 to 1958, \$8,000 1959 to 1963, \$9,000 1964 to 1971, all inclusive, \$10,000 1972, \$11,000 1973, \$12,000 1974, \$13,000 1975 to 1977, inclusive, and \$14,000 1978 to 1981, inclusive—the first \$54,000 maturities bear interest at $2-\frac{3}{4}$ % per annum and the remainder at 3% per annum.

- 2. Said Committee has caused to be published in the newspaper known as The Salisbury Post, published in the County of Rowan, North Carolina, a notice that it would receive sealed bids for the purchase of said bonds until 11 o'clock A.M., October 8, 1946.
- 3. The proposal to purchase said bonds, a copy of which is hereto annexed and marked "Exhibit A" submitted by J. Lee Peeler and Company, Inc., and Associates, was duly accepted by a resolution adopted by said Committee on the 8th day of October 1946, at a meeting duly called and held and attended by at least three (3) members of said Committee. Said proposal named the lowest interest rate named in any proposal received pursuant to said notice and the price specified in said proposal is greater than that specified in any other such proposal received naming the same rate of interest.
- 4. No request or application for the review of any orders or resolutions adopted, or other proceedings taken by said Committee with respect to said bonds has been filed with said Commission, and no objection to the award of said bonds made by said Committee has been made to said Commission or Committee.
- 5. A certificate stating that the issuance of said bonds has been approved under the provisions of the Local Government Act of North Carolina appears upon the reverse of each bond, and has been signed by an assistant duly designated by said Secretary for that purpose.
- 6. The facts stated in this certificate are shown by the official records of said Commission kept by said Secretary.

In Witness Whereof, this certificate is signed by said Secretary this 2d day of November, 1946.

NOTICE OF SALE OF BONDS \$300,000 TOWN OF LANDIS, NORTH CAROLINA WATER AND SEWER BONDS

Sealed bids will be received until 11 o'clock a.m., Eastern Standard Time, October 8, 1946, by the undersigned at its office in the City of Raleigh, N. C., for \$300,000 Water and Sewer Bonds of the Town of Landis, N. C. dated June 1, 1946, and maturing annually on June 1, \$6,000 1949 to 1958, \$8,000 1959 to 1963, \$9,000 1964 to 1971, all inclusive, \$10,000 1972, \$11,000 1973, \$12,000 1974, \$13,000 1975 to 1977, all inclusive, and \$14,000 1978 to 1981, all inclusive, without option of prior payment. There will be no auction. Denomination \$1,000; principal and semiannual (J & D 1) interest payable in lawful money in New York City; coupon bonds registerable as to principal only; general obligations; unlimited tax; delivery at place of purchaser's choice.

Bidders are requested to name the interest rate or rates, not exceeding six per cent per annum in multiples of one-fourth of one per cent. Each bid may name one rate for part of the bonds (having the earliest maturities), and another rate or rates for the balance, but no bid may name more than four rates, and each bidder must specify in his bid the amount of bonds of each rate. Each rate must be bid for bonds of consecutive maturities. The bonds will be awarded to the bidder offering to purchase the bonds at the lowest interest cost to the Town, such cost to be determined by deducting the total amount of the premium bid from the aggregate amount of interest upon all of the bonds until their respective maturities. No bid of less than par and accrued interest will be entertained.

Bids must be enclosed in a sealed envelope marked "Proposal for Bonds" and be accompanied by a certified check upon an incorporated bank or trust company, payable unconditionally to the order of the State Treasurer of North Carolina for \$6,000. The right to reject all bids is reserved. The approving opinion of Messrs. Reed, Hoyt & Washburn, New York City, will be furnished the purchaser.

In the event that prior to the delivery of the bonds the income received by private holders from bonds of the same type and character shall be taxable by the terms of any Federal income tax law, the successful bidder may, at his election, be relieved of his obligations under the contract to purchase the bonds, and in such case, the deposit accompanying his bid will be returned.

LOCAL GOVERNMENT COMMISSION By W. E. Easterling Secretary of the Commission

(Bid form on reverse)

These are the identical bonds offered for sale on September 24, 1946 at which time only one bid was received. The bid was for interest cost of 3.62% and was rejected.

Contrary to the statement accompanying the previous offering, the two mills in the town pay about 67% of the taxes levied and not 95%. These mills do not purchase electric power from the town.

"EXHIBIT A"

PROPOSAL FOR BONDS

Oct. 8, 1946

Local Government Commission, Raleigh, North Carolina.

We make the following offer for the bond issue of the Town of Landis, North Carolina, described in the notice of sale on the reverse hereof, which is hereby made a part of this bid:

(The bidder will fill in only one of the four alternative bids provided below and cross out the others.)

1. For \$200,000 Water and Sewer Bonds bearing interest at ______ per annum.

or

- 2. For \$300,000 Water and Sewer Bonds, \$54,000.00 of said bonds of the earliest maturities bearing interest at 2-34% per annum, and the remainder bearing interest at 3% per annum.

we will pay three hundred thousand and 00/100 dollars (\$300,-000.00).

We will also pay accrued interest to date of delivery and will accept delivery at The Fidelity Bank in Durham, N. C. in accordance with said notice.

We enclose herewith certified check for \$6,000, payable to the order of the State Treasurer, which enclosure is to be returned to us if this bid is not accepted, but otherwise is to be deposited by said State Treasurer, and when the bonds are delivered and paid for under the terms of this bid, is to be considered as an advance part payment therefor, or is to be retained as and for liquidated damages in case we fail so to take up and pay for the bonds.

J. Lee Peeler and Company, Inc. Vance Securities Corporation

By: Thos. L. Vance

No addition or alteration, except as provided above, is to be made to this proposal.

STATE OF NORTH CAROLINA LOCAL GOVERNMENT COMMISSION RALEIGH

SIGNATURE CERTIFICATE

I, C. H. England, an assistant designated by the Secretary of the Local Government Commission of North Carolina, do hereby certify that on the 2 day of November, 1946, I signed on the reverse of each of the bonds hereinafter described, a certificate stating that the issuance of said bonds has been approved under the provisions of the Local Government Act of North Carolina.

I Further Certify that said bonds consist of the following bonds of the Town of Landis, North Carolina, the issuance of which was approved by an order adopted by said Local Government Commission on the 14 day of May, 1946, viz.:

\$300,000 Water and Sewer Bonds, Nos. 1 to 300, inclusive, in the denomination of \$1,000 each, dated June 1, 1946 and maturing annually on June 1st \$6,000 1949 to 1958, \$8,000 1959 to 1963, \$9,000 1964 to 1971, all inclusive, \$10,000 1972, \$11,000 1973, \$12,000 1974, \$13,000 1975 to 1977, inclusive, and \$14,000 1978 to 1981, inclusive the first \$54,000 maturities bear interest at 2-¾% per annum and the remainder at 3% per annum.

In Witness Whereof, I have hereunto set my hand this 2 day of November, 1946.

C. H. England, Assistant

I, W. E. Easterling, Secretary of the Local Government Commission of North Carolina, do hereby certify that the signature appearing above is the true and genuine signature of C. H. England, who was duly designated by me as an Assistant to sign the certificate required by Section 22 of the Local Government Act of

North Carolina to be endorsed upon each of the bonds hereinabove described.

W. E. Easterling, Secretary of Local Government Commission of North Carolina.

SIGNATURE AND NO LITIGATION CERTIFICATE

We, the undersigned, acting as officers of the public corporation of the State of North Carolina, known as the TOWN OF LANDIS DO hereby severally certify, as follows:

- Subsequent to October 1, 1946, and prior to the date of this certificate we have signed each of the following obligations of said public corporation, viz.: \$300,000 Water and Sewer Bonds consisting of three hundred \$1,000 coupon bonds, numbered from 1 to 300, inclusive, in the order of their maturity, dated June 1, 1946, and maturing serially on June 1st in each year as follows: 6 bonds in 1949 to 1958, inclusive, 8 bonds in 1959 to 1963, inclusive, 9 bonds in 1964 to 1971, inclusive, 10 bonds in 1972, 11 bonds in 1973, 12 bonds in 1974, 13 bonds in 1975 to 1977, inclusive, and 14 bonds in 1978 to 1981, inclusive; authorized by bond ordinances adopted by the Board of Aldermen of said Town on April 3, 1946. The bonds numbered from 1 to 54, inclusive, bear interest at the rate of two and three-quarters per centum (23/4%) per annum and the bonds numbered from 55 to 300, inclusive, bear interest at the rate of three per centum (3%) per annum, and interest is payable semi-annually on June 1st and December 1st.
- 2. At the time we signed said obligations we were, and we now are, the duly chosen, qualified and acting officers of said public corporation, as indicated below. The seal affixed to or impressed upon this certificate is the corporate seal which has been heretofore adopted for and is now in use by said public corporation and said seal has been affixed to or impressed upon each of said obligations. At the time said obligations were so signed there were attached to each of them interest coupons representing all interest payable on such obligation subsequent to the date of this certificate and on or before its maturity and each of said interest coupons bears the facsimile signature of the undersigned Town Clerk.
- 3. Neither the proceedings authorizing said obligations, hereinbefore described, nor the authority to execute and issue said obligations on behalf of said public corporation heretofore granted to the undersigned by said proceedings, have been revoked or rescinded or repealed or modified or amended in any respect.
- 4. No litigation is now pending or threatened to restrain or enjoin the issuance or delivery of said obligations or in any manner

questioning the authority of said public corporation to issue or the issuance or validity of said obligations or the constitutionality of any statute or the validity of any proceedings authorizing said obligations, or the levy or collection of taxes to pay said obligations. Neither the corporate existence or boundaries, nor the title of any of said officers to their respective offices, is being contested.

In Witness Whereof, we have hereunto set our hands and the corporate seal of said public corporation, this 31st day of October, 1946.

	Office	Signature
SEAL	Mayor	L. A. Corriher,
	Town Clerk	J. Fred Corriher,

I hereby certify that I know the persons whose signatures appear above and am familiar with their signatures, and that I have examined their signatures on this certificate and that such signatures are genuine and that said persons hold the offices of said public corporation described in said certificate as stated in said certificate.

J. F. Deal, Cashier M. & F. Bank, BANK Merchants & Farmers Bank

STATE OF NORTH CAROLINA TREASURY DEPARTMENT RALEIGH

STATE TREASURER'S RECEIPT OF THE PROCEEDS OF THE SALE OF BONDS OR NOTES

I, CHAS. M. JOHNSON, Treasurer of the State of North Carolina, DO HEREBY CERTIFY that, on the date last below mentioned (being the date of actual delivery of the bonds or notes herein described to the purchaser(s) thereof), I received from

J. LEE PEELER AND COMPANY, INC. DURHAM, N. C.

the purchase price of the following described bonds of the TOWN OF LANDIS, N. C.:

\$300,000 Water and Sewer Bonds, Nos. 1 to 300, inclusive, in the denomination of \$1,000 each, dated June 1st, 1946 and maturing annually on June 1st \$6,000 1949 to 1958, \$8,000 1959 to 1963, \$9,000 1964 to 1971, all inclusive, \$10,000 1972, \$11,000 1973, \$12,000 1974, \$13,000 1975 to 1977, inclusive, and \$14,000 1978 to 1981, inclusive the first \$54,000 maturities bear interest at 2-34% per annum and the remainder at 3% per annum.



I FURTHER CERTIFY that the sum thus received by me was as follows: Principal (par value).....\$ 300,000.00 Premium None Accrued interest on \$ 54,000.00 at 2-34% per annum from June 1, 1946 to the date of actual delivery 643.50 Accrued interest on \$ 246,000.00 at 3% per annum from June 1, 1946 to the date of actual delivery 3.198.00 The date of actual delivery of said bonds or notes being November 7, 1946 CHAS. M. JOHNSON, Treasurer of the State of North Carolina By L. B. Parker, Deputy Treasurer.

A. AUTHORIZATION AND ISSUANCE OF BONDS—TAXPAYERS' SAFEGUARDS

(1) In General

Local borrowing may be classified in various ways. One basic pattern distinguishes between current and long-term loans. Current, short-term borrowing involves anticipation of the collection of current revenues, long-term borrowing of the revenues of future years. We are concerned here only with the latter. Debt evidenced by such obligations is called "funded" debt. The term derives from a practice, which has roots extending back into the Middle Ages, of borrowing to meet public expenses and earmarking particular revenues as a fund to meet principal and interest requirements. Today, of course, long-term obli-

gations are considered funded debt whether particular revenues are set aside for payment or not. Coupons are a convenient means of evidencing the obligation to pay interest on negotiable bonds, and are useful in effecting collection. Each coupon represents the interest obligation for a specific period during the life of the bond. It is a current charge constituting no part of the funded debt. This difference may have legal consequences. Thus, would a grant of power to refund bonds of a city include authority to fund overdue coupons on those bonds? Clearly, bonds issued to fund floating debt are not refunding bonds in the sense of a statutory debt limitation which excepts "refunding" bonds. Lee v. Hancock County, 181 Miss. 847, 178 So. 790 (1938).

Local borrowing may involve either original financing or refinancing, or both. The mixed type is rare. It is employed in at least one state. Arkansas. See City of Harrison v. Braswell, 209 Ark. 1094. 194 S.W.2d 12 (1946); Bay Special Consol. School Dist. of Craighead County v. Hall, 194 Ark, 423, 107 S.W.2d 347 (1937). See also Brailsford v. Walker, 205 S.C. 228, 31 S.E.2d 385 (1944). A general obligation bond contains an unconditional promise to pay. It binds the faith and credit of the borrowing unit. A special obligation bond is a conditional undertaking: the borrower promises to pay only from a special fund, whether it be fed by special assessments or the income from some revenue-producing facility or activity. Such bonds are designated special assessment bonds or revenue bonds, as appropriate. A particularly attractive security may be created by combining a general obligation with a pledge of special revenues. To the extent that such revenues cover debt service resort to tax levies is obviated.

In the absence of constitutional provisions limiting the objects of local borrowing, bonds may be authorized for any purpose for which a local unit may spend money. This includes current expenses. The power may be devolved upon local government, however unwise its exercise for such objects as current operations might be.

There has been much discussion of the question whether the power to borrow may properly be implied. The power to borrow and authority to issue negotiable paper in evidence of a loan are plainly not the same thing. Thus, there are further questions whether the power to issue negotiable bonds may be implied along with the power to borrow or may be implied from an express grant of power to borrow. While there is considerable diversity in the decisions, the problem, as Judge Dillon has pointed out, is basically one of legislative intent. I Dillon, Mun. Corps., § 289 (5th ed. 1911). As a practical matter, the inquiry

is not significant in contemporary public finance because effective marketing of securities is not to be rested upon loose implications of power and because, as a matter of policy, the states have seen fit to adopt more or less elaborate bond enabling legislation, which regulates in some detail such features as interest rates and maturities. It may be of some interest, however, to take a brief backward look.

In Russell v. Middletown City School District, 101 Conn. 249, 125 A. 641 (1924), a statute authorizing school districts to lay taxes and borrow money for certain purposes was interpreted to authorize negotiable bonds. The court's opinion contained an historical review of the cases which bears quoting.

"During the greater part of the past century the courts, federal and state, almost uniformly held that the power to borrow money carried with it the power to issue negotiable bonds. The cases involving the point arose mostly in the older states, and the judicial holdings were apparently sustaining a uniform and customary course of financial procedure.

"In the fourth edition of Dillon on Municipal Corporations, the decisions amply justified stating the law to be that—

'Express power to municipal corporations "to borrow money" is usually held to include the power to issue its negotiable bonds or other securities to the lender.' Section 1890 (4th Ed.) p. 127.

"In the fifth edition of this work the learned author notes the changed current of decision leading to serious qualification of his prior statement. 2 Dillon Municipal Corporations, Secs. 873, 874, 877. This change in judicial attitude arose from a large volume of litigation occurring mostly in the western and southwestern states, which was largely conducted in the federal courts. It was an incident to the rapid and phenomenal industrial and financial development of the whole country in the period following the Civil War. Large undertakings by municipalities in the way of public improvements and grants of money to railroads inconsiderately and improvidently undertaken were financed by reckless prodigality in the issue of municipal securities.

"At first decisions were in accord with the law as previously understood and as quoted above. Rogers v. Burlington, 3 Wall. 654, 18 L.Ed. 79; Mitchell v. Burlington, 4 Wall. 270, 18 L.Ed. 350. From time to time in various cases the Supreme Court in one way or another narrowed the scope of the doctrine and in Merrill v. Monticello, 138 U.S. 673, 11 S.Ct. 441, 34 L.Ed. 1069, the court held that the implied power (if it existed) of a municipality to borrow money in execution of powers expressly conferred by law did not authorize it to create and issue negotiable bonds, and that the power to borrow money and the power to give an obligation which may circulate in the market freed

from any equities which may be set up by the maker were essentially different in nature and legal effect. This series of decisions culminated in the case of Brenham v. German American Bank (1892) 144 U.S. 173, 12 S.Ct. 559, 36 L.Ed. 390, in which the court followed the ruling in Merrill v. Monticello, supra, and took the further position that an express charter power to borrow up to a certain amount for general purposes did not imply the authority to issue negotiable bonds incontestible in the hands of a bona fide holder. This decision overrules Rogers v. Burlington and Mitchell v. Burlington, supra. The only concession made in the sweeping terms of this decision is the suggestion that the power to issue bonds might be implied from express power to borrow, where to deny it would render the borrowing power nugatory. Such is the view stated in Ashuelot Nat. Bk. v. School District, 56 F. 197, 5 C.C.A. 468, reviewing the federal decisions. up to its date, and has been generally accepted as a correct exposition of the doctrine of the United States courts.

"The existing rule of the federal courts just stated obtains in Alabama, Illinois, Louisiana, New Jersey, and Texas, while the older rule is in force in Massachusetts, Arkansas, Georgia, Kentucky, Nevada, Ohio, New York, Rhode Island, Virginia, and Wisconsin. Dicta favoring one rule or the other also occur in the decisions of other states. Illinois is the only state apparently which receded from an adherence to the earlier views. Recent cases are more or less controlled by statutory regulation, either covering the entire subject or, to some extent, affecting the rule previously worked out in decided cases. Citation in detail of numerous cases found in the books would not especially advance the discussion. The cases favoring either view are referred to in 19 R.C.L. 991, in notes 17 and 18, and collected and considered in the note to Weil v. Newbern, Ann.Cas.1913E, 25, at pages 39, 40, 41.

"The reasoning upon which is based the proposition now held as law in the federal courts, that the power to borrow money by virtue of legislative authority so to do will not carry with it the power to issue negotiable bonds, is perhaps best stated in the quotation from the case of Police Jury v. Britton, 15 Wall. 566, 21 L.Ed. 251, occurring in the opinion in Merrill v. Monticello, supra, at page 689 (11 Sup.Ct. 447), as follows:

"'We do not mean to be understood that it requires, in all cases, express authority for such bodies to issue negotiable paper. The power has frequently been implied from other express powers granted. Thus it has been held that the power to borrow money, implies the power to issue the ordinary securities for its repayment, whether in the form of notes or bonds payable in the future. * * But in our judgment these implications should

not be encouraged or extended beyond the fair inferences to be gathered from the circumstances of each case. It would be an anomaly, justly to be deprecated, for all our limited territorial boards, charged with certain objects of necessary local administration, to become the fountains of commercial issues, capable of floating about in the financial whirlpools of our large cities.'

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"The opposing doctrine has, perhaps, never been better stated than in the dissenting opinion of Mr. Justice Harlan in Brenham v. German American Bank, supra, where he states:

"It seems to us that the court, in the present case, announces for the first time that an express power in a municipal corporation, to borrow money, for corporate or general purposes, does not, under any circumstances, carry with it, by implication, authority to execute a negotiable promissory note or bond for the money so borrowed, and that any such note or bond is void in the hands of a bona fide holder for value. There are, perhaps, few municipal corporations anywhere that have not, under some circumstances, and within prescribed limits as to amount, express authority to borrow money for legitimate, corporate purposes. While this authority may be abused, it is often vital to the public interests that it be exercised. But if it may not be exercised by giving negotiable notes or bonds as evidence of the indebtedness so created—which is the mode usually adopted in such cases—the power to borrow, however urgent the necessity, will be of little practical value. Those who have money to lend will not lend it upon mere vouchers or certificates of indebted-The aggregate amount of negotiable notes and bonds, executed by municipal corporations, for legitimate purposes, under express power to borrow money simply, and now outstanding in every part of the country must be enormous. A declaration by this court that such notes and bonds are void, because of the absence of express legislative authority to execute negotiable instruments for the money borrowed, will, we fear, produce incalculable mischief. Believing the doctrine announced by the court to be unsound, upon principle and authority, we do not feel at liberty to withhold an expression of our dissent from the opinion.'

"The underlying reason of decision in those states, where the power to issue bonds implied from the power to borrow money is denied, seems to be that the power is a dangerous one, in that negotiable bonds in the hands of a bona fide purchaser are not subject to most equitable defenses, and hence municipalities may suffer greatly from an indebtedness incurred under the forms of law, and evidenced by bonds improvidently and sometimes corruptly issued and their proceeds misapplied.

"On the other hand, such implied power is sustained on the ground that the power to borrow is practically ineffective where large loans are concerned, unless resort may be had to ordinary and well-recognized methods of issuing corporate securities, and any attempt to evidence indebtedness by instruments not fully negotiable would either fail, or, if carried out, could only be effected with inconvenience in debt administration, and the burden of higher interest charges which are uniformly imposed on any security which departs from the ordinary type prevailing in the investment market.

"Having regard to the authorities above cited and the ordinary course of corporate financing which they recognize and evidence as prevailing in the jurisdictions to which they pertain, we are satisfied that the power to issue bonds implied from the express power to borrow has been recognized as legal in the majority of the older states, and especially in New England, and that corporate securities have been issued and are now outstanding in large amounts, based upon this understanding of the law. The decisions in which this power is denied assert the necessity of legislative grant to confer it. We regard the power as so firmly established by usage and authority that it can only be taken away by legislative denial or limitation, and ought not to be negatived by judicial interpretation. The effective curb upon hasty and inexpedient financing by municipal corporations is the debt limit, which in late years has become almost universal, and exists in this state, and not in making a distinction between the power to borrow and the form of evidence of indebtedness."

It is easy, in the case of general obligation bonds, to imply, from a grant of power to issue "bonds", authority to issue negotiable securities. Hunter v. City of Louisville, 208 Ky. 326, 270 S.W. 841 (1925); Keck v. Yakima Savings and Loan Ass'n, 160 Wash. 430, 295 P. 483 (1931). The situation as to revenue bonds is quite different. Since they are conditional obligations they lack an essential element of negotiability under N.I.L. § 1(2). It would seem necessary, therefore, to cover the point by statute, as has been done by most of the later enabling statutes. But see State ex rel. Consumers Public Power District v. Boettcher, 138 Neb. 22, 32, 291 N.W. 709, 714 (1940). Concerning the possibility of achieving negotiability by contract see J. B. Fordham, "Revenue Bond Sanctions" 42 Col.L.Rev. 395, 398 (1942).

The power to perform a given public function and the ancillary power to finance it are by no means the same thing. In the case of any proposed local bond issue it is important to determine that there is authority both for the "project" and the bonds. Ordinarily a grant of power to issue bonds for a given purpose presupposes that authority to carry out the purpose depends upon

an independent grant and only the plainest and most unmistakable implication would warrant a grounding of the primary power upon a grant of the ancillary authority.

(a) Promise to pay

In a general obligation bond the promise to pay will read substantially as that in the bond form set out in the transcript. A revenue bond will qualify the promise by adding a clause, such as "but only out of the special funds hereinafter mentioned", which will be supported by a subsequent paragraph describing the special fund. Suppose that the issuer of purportedly general obligation bonds were limited by law in the amount or rate of taxation which might be levied for the purpose of paying principal and interest? Would that in effect render the bonds special obligations? Hardly, in the case of an overall tax limit, since the unit would be committed to the extent of its legal capacity. In Ohio only non-voted municipals are subject to the tax limits. To obviate any question the General Code makes them negotiable regardless of whether they would be deemed to be conditional under the N.I.L. Ohio Gen.Code, § 2293-37a (Page, Supp.1947).

(b) Medium of payment

Prior to 1933 municipal bonds quite commonly called for payment in gold. In that year, however, Congress exercised its monetary powers to strike down gold clauses in existing obligations and ban them for the future. This legislation was upheld in a case involving railroad bonds. Norman v. B. & O. R. Co., 294 U.S. 240, 55 S.Ct. 407 (1935). The decision, in principle, governs municipals. Since it was rendered the practice has been to call for payment in legal tender. Sample clauses are "in lawful money of the United States" and "in any coin or currency of the United States of America which at the time of payment is legal tender for the payment of public and private debts". It is not evident what such language adds.

(c) Place of Payment

There may be an advantage, particularly in the case of a large issue seeking a wide market, in providing for payment at a bank in a large financial center. Sometimes alternative places of payment are designated. This has the disadvantage to the unit of entailing deposits at more than one place. If the unit makes payment directly it is in a position to keep informed as to who owns the bonds. This is valuable information in case of redemption of callable bonds or refinancing undertaken to prevent or cure a default. Enabling legislation usually leaves the local authorities with wide discretion as to place of payment. Even

were a designated place unauthorized the validity of the bonds would not be affected. Sherlock v. Village of Winnetka, 68 Ill. 530 (1873).

(d) Interest

The maximum rate of interest on municipal bonds, it is safe to say, is a subject specifically covered in almost every enabling statute. Improper use of power to issue bonds at a discount has made it almost equally common to forbid issuance below par. Thus, maximum interest rates are usually set simply in terms of a per centum of par. There is no objection, however, to original sale at a discount subject to the limitation that the net interest cost to the borrower will not exceed the maximum rate. Such a provision is to be found in Virginia. Va.Code § 3084 (Michie, 1942). Considerable flexibility in rates, both as to separate maturities in a single issue and as to different periods in the life of a particular bond, is usually permitted. The transcript contains an example of different rates for different maturities. Great flexibility is especially desirable in refunding operations.

Interest is paid semi-annually. Exceptions to this practice are negligible. Interest is represented by coupons, one for each six-months interest period. An illustrative coupon form appears in the transcript. Coupons may be detached prior to maturity and separately held or negotiated. Where that is done, the coupons become distinct obligations, which will survive the life of the principal obligation, subject to the running of the statute of limitations. Jennings v. Morehead City, 226 N.C. 606, 39 S.E. 2d 610 (1946).

In the past one device employed in an effort to circumvent provisions setting maximum interest rates or forbidding sale below par has been a stipulation allowing the purchaser a blanket deduction from the purchase price to cover such costs as preparing the bonds and fees of bond counsel. It was, for the most part, unsuccessful where challenged. Duff v. Knott County, 238 Ky. 71, 36 S.W.2d 870 (1931); Hattrem-Nelson & Co., Inc., v. Salmon River-Grande Ronde Highway Imp. Dist., 132 Or. 297, 285 P. 231 (1930). It is one thing for the borrower to use bond proceeds directly to cover costs of issue and quite another to purport to use as a paid agent in such matters a bond purchaser who is dealing at arm's length.

It will be observed that the bond form set out in the transcript calls for payment of interest until maturity at the stipulated rate. This means that were a bond defaulted at maturity the rate thereafter would be the (much higher) legal rate, since the subject would not be covered by contract. This result can be avoided by expressly stipulating that the bond bear interest at the stated rate until the principal sum be paid. From the bondholder's standpoint such a stipulation may be a necessity in the case of a revenue bond, since it is a special obligation payable from a particular fund. There could be no application of the legal rate of interest as damages after default on the principal at maturity because there is no personal liability, unless the court were prepared to allow interest payable solely from the special fund.

(e) Maturities

There was a time when municipals were practically all term bonds, that is, all bonds of an issue were payable at the end of a fixed term such as twenty or thirty years. Provision for amortization was made by creating and building up a sinking fund. An issue of serial bonds matures in annual installments. The problems arising out of sinking fund administration, whether associated with ineptitude, neglect or misdoing, long since brought term bonds into disrepute, especially as a financing instrument of small local units. Their chief utility today is in refinancing operations where it is desired to favor a financially weak borrower for a time at least and obviate the possibility of default on the principal of refunding bonds. Serial maturities, then, are the order of the day.

Unless controlled in some way serial maturities may be so scheduled as to render the issue, in substance, a term bond af-Accordingly, statutory provisions have been framed to force an appropriate spread. The North Carolina Municipal Finance Act, for example, limits a particular maturity to two and one half times the amount of the smallest prior one. In some states the matter has been carried to the extreme of requiring substantially equal annual payments of combined principal and interest. Louisiana, for example, has such a requirement, which allows a tolerance of three per centum of the total authorized issue. See La. Stats. § 8854 et seg. (Dart, 1939). This rigid system has the unfortunate effect of preventing a unit from planning a maturity schedule in relation to the maturities of other issues, outstanding and projected, with a view to a wellbalanced over-all debt service burden. Maximum maturities, as a matter of sound finance, should not exceed the estimated life of the public improvement for which bonds are issued but legal limitations based on this principle are none too common.

(f) Redemption prior to Maturity

Since 1940 the market for municipals had, until recently, been unprecedented; bonds have been issued at record low interest rates. Such a market made many a local officer reflect

mournfully upon the absence of call provisions in outstanding bonds issued in years of prevailing high interest rates. Thus, there has been keen sensitivity to the redemption feature, but its employment in such times cannot reasonably be expected to pave the way for advantageous voluntary refunding in a later period of even lower interest rates. This, of course, has no bearing on the value of call provisions as a device to enable a unit to minimize net interest costs by accelerating maturity. Philadelphia Sav. Fund Society v. City of Bethlehem, 143 Pa.Super. 449, 17 A.2d 750 (1941), is an interesting redemption case. A call feature in a security otherwise attractive to investors may mean a slightly higher interest rate to offset the potential burden and expense of reinvesting. A local unit may not be free to obviate this by stipulating redemption at a premium. Thus, under the Ohio Uniform Bond Act bonds may be made callable at not more than par. Ohio Gen.Code § 2293-6 (Page, 1937).

Call provisions are a matter of contract. Authority to include them may be specifically granted or readily implied from an enabling statute which leaves substantial local discretion as to the terms of an issue. If the privilege of redemption is not stipulated the bondholder's position is secure. The fact that bonds, when issued, were obligations which the unit then had statutory authority to refund makes no difference. The power to refund does not amount, by implication, to a call provision. Evangeline Parish School Board v. Kansas City Life Ins. Co., 153 F.2d 611 (C.C.A.5th, 1946).

(g) Registration

Provision may be made for registrations as to principal only, as to interest only or as to both. Registration of a bearer bond converts it into an obligation to pay to a particular person and thus destroys negotiability. It is a protection against the risks of loss and theft which attend bearer bonds. If registerable as to principal only, the coupons remain negotiable and negotiability as to principal may easily be restored by further registration to bearer. Bonds fully registerable or registerable as to interest only are less common. Such registration entails detachment and destruction of coupons and payment of interest by check or bank draft. Restoration to negotiability is burdensome because new coupons must be prepared and attached to the bond.

Seldom are bonds issued originally in registered form. An occasion for doing so may arise in a funding operation, where there are odd fragments of debt to be funded over and above an even amount. The case which follows presents an interesting example of the use of so-called registered stock.

FIRST NAT. BANK OF BINGHAMTON, N. Y., v. MAYOR AND CITY COUNCIL OF BALTIMORE

Circuit Court of Appeals of the United States, Fourth Circuit, 1940. 108 F.2d 600.

SOPER, CIRCUIT JUDGE. The First National Bank of Binghamton, New York, brought this suit to recover from the Mayor and City Council of Baltimore, a municipal corporation, the face value of two certificates, with interest, in each of which it was certified that the corporation was indebted to L. F. Rothschild and Company in the sum of \$5,000 due and payable on May 1, 1933 upon the surrender of the certificate, with interest thereon until due at 4 per cent per annum. The certificates had been issued on October 6, 1925 in pursuance of a city ordinance which authorized the issuance of the registered stock (so called) of the corporation. On the back of each certificate was printed a form of assignment, which had been signed in blank by Rothschild and Company. On the face was the recital that it was transferable only at the office of the City Register in Baltimore in person or by attorney. The certificates had come into the hands of the bank in due course of business as security for a loan.

The defense to the suit was based on facts, found by the District Judge on sufficient evidence, which showed that the certificates had been stolen or misappropriated from the lawful owner, and that the city had caused duplicates to be issued, which were duly paid on maturity. Originally the certificates were issued to Rothschild and Company, stockbrokers in New York City, on October 6, 1925; were endorsed in blank by Rothschild and Company and sold and delivered by them to Redmond and Company, also stockbrokers in New York, prior to December 17, 1925; and were sold and delivered back to Rothschild and Company in the same form on the last mentioned date. On the same day they disappeared and some question arose between the brokers as to whether the redelivery had actually taken place, but the District Judge found that it did take place, and the evidence supports the finding.

The City Register of Baltimore City was notified that the certificates had been lost or stolen, and on May 17, 1926, new certificates payable to Rothschild and Company were issued, after the making of an affidavit, the publishing of an advertisement and the delivery of an indemnity bond, as provided in city ordinances. Thereafter the new certificates were transferred on the books of the city to other holders, and semi-annual interest was paid as it fell due until May 1, 1933 when the principal sums of the indebtedness were also paid to the holders.

In the meantime, on February 8, 1926, one Cronemeyer, a business man and property owner in Binghamton, borrowed \$8,000 from the plaintiff bank and gave the two certificates as collateral. On May 24, 1926 he borrowed an additional \$20,000. He gave his note for \$28,000 to the bank, merging the new loan with the old, and gave as additional collateral certain non-negotiable interim certificates for \$24,000 of bonds of the Buffalo General Electric Company. The note was not paid when due, and the collateral proved to be unsaleable when it was charged that both sets of securities had been stolen. The interim certificates also had been in the possession of Rothschild and Company and by mistake had been delivered by them to an outsider and the circumstances justified the inference that he had stolen them. When they turned up in the hands of the plaintiff bank, Rothschild and Company brought suit against the bank and succeeded in recovering them. See, Rothschild & Co. v. First Natl. Bank of Binghamton, 140 Misc. 499, 251 N.Y.S. 25, affirmed without opinion in 237 App.Div. 808, 260 N.Y.S. 975, and in 262 N.Y. 559, 188 N.E. 63. The evidence did not show how Cronemeyer secured possession of the securities, but it is significant that both the certificates and the bonds came into the hands of Cronemever and were pledged by him to the bank.

The city had no notice that the missing certificates had come to light until after the new certificates had been issued to Rothschild and Company and had been transferred on the books of the city to other persons. This transfer took place on August 12, 1926. There was evidence that some time during that month. an attorney for the bank came to Baltimore and presented the original certificates to the City Register for transfer, but transfer was refused. The testimony was given twelve years after the event, and the absence of any written record left the date in such doubt that the judge reached the justifiable conclusion that the bank had failed to show that the city had notice of its claim until after the new certificates had been issued and transferred on its books. The bank took no further action until 1929, when it brought suit in a State court in Baltimore City for interest due up to that time. The suit was dismissed two years later for want of prosecution. Nothing further was done by the bank until the present suit was instituted on October 25, 1938. Upon all of these facts the District Judge, in a carefully considered opinion. decided that the bank was not entitled to recover. First Nat. Bank v. Mayor & City Council, D.C., 27 F.Supp. 444.

The bank claims, in the first place, that its title to the certificates was equivalent to that of a holder in due course of a negotiable instrument; and hence the nature of the certificates with respect to negotiability must first be determined. On this point

we are in accord with the conclusion of the District Judge, who said (27 F.Supp. 450): "Whether tested by the negotiable instruments act or the prior law of merchants, it is clear on principle that the certificates are not negotiable. In form they constitute certificates of indebtedness to a named person and a promise to pay a definite sum of money on a definite date, with interest thereon payable semi-annually on stated dates. They are not payable to the holder or his order, nor to him or bearer, nor even expressly to him and his assignees. The certificates also contain the legend that they are transferable only on the books of the City by the holder in person or by attorney. As the certificates are not made payable 'to order or to bearer', and contain no similar or equivalent words indicating an intention to make them negotiable, they are not negotiable instruments (Md.Code, Art. 13, §§ 20, 29); Citizens' Nat. Bank v. Custis, 153 Md. 235, 244, 138 A. 261, 53 A.L.R. 1165. In common with other choses in action for the payment of money they are assignable, but not negotiable. Interest payments are made by the City by check payable to the named holder. The certificates do not carry coupons for the interest payments. In legal nature and effect the so-called City stock is really a fully registered bond. Similar bonds, of an ordinary corporation, were held to be assignable but not negotiable . . . in Bank of United States v. Cuthbertson [4 Cir.], 67 F.2d 182, 187".

Since the certificates were not negotiable, the bank cannot recover upon the theory that it is a bona fide holder for value without notice of any infirmity in the title of Cronemeyer, from whom it received the certificates. But the bank also claims that it acquired a title to the certificates superior to that of Rothschild and Company under the doctrine of estoppel, as outlined in such cases as National Safe Deposit S. & T. Co. v. Hibbs, 229 U.S. 391, 33 S.Ct. 818, 57 L.Ed. 1241; First National Bank v. Lanier, 11 Wall. 369, 20 L.Ed. 172; Scollans v. Rollins, 179 Mass. 346, 60 N.E. 983, 88 Am.St.Rep. 386, and Russell v. Bell Tel. Co., 180 Mass. 467, 62 N.E. 751. The rule of these cases is that when an owner of such property as stock certificates entrusts them to an agent and clothes him with such indicia of ownership that a bona fide purchaser would be justified in believing that the agent is authorized to sell, the true owner is estopped from denying the title of the purchaser, although the agent has in fact acted corruptly and without the owner's authority.

The pending case must be decided according to the applicable State law, Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487; and as the transfer of the certificates to the bank took place in New York, the law of that State governs under the rule announced in the Maryland decisions.

Mylander v. Page, 162 Md. 255, 265, 159 A. 770. The New York law of estoppel in kindred cases conforms to the rule outlined above. Knox v. Eden Musee Americain, 148 N.Y. 441, 42 N.E. 988, 31 L.R.A. 779, 51 Am.St.Rep. 700; Union Trust Co. v. Oliver, 214 N.Y. 517, 108 N.E. 809; People's Trust Co. v. Smith, 215 N.Y. 488, 109 N.E. 561, L.R.A.1916B, 840, Ann.Cas.1917A, 560; Reynolds v. Title Guarantee & Trust Co., 240 N.Y. 257, 148 N.E. 514; Manhattan Co. v. Morgan, 242 N.Y. 38, 150 N.E. 594; Van Schaick v. National City Bank, 245 App.Div. 525, 283 N.Y.S. 372, affirmed, 271 N.Y. 570, 3 N.E.2d 189. There is some doubt whether the rule is applicable in New York to non-negotiable instruments endorsed in blank and not covered by the Uniform Stock Transfer Act, as is pointed out in the opinion of the District Judge, 27 F.Supp. 444 at page 452-454. But even if it be assumed that the rule is applicable to the kind of instruments that are in suit, a holder of the securities does not acquire a title superior to that of the true owner unless it appears that the owner has entrusted them with the indicia of ownership to an agent from whom directly or indirectly the holder has acquired them in good faith. This situation does not exist in the pending case.

Since the bank has failed to show that it has a title superior to that of Rothschild and Company, its suit must fail, and it is not necessary to consider the further point discussed below that in any event the bank could not recover because, under the circumstances of the case, the city had a superior equity in its favor against Rothschild and Company at the time that it first received notice of the bank's claim.

Affirmed.

(h) Denominations

It is standard practice, in keeping with market requirements, to issue municipals in denominations of \$1,000. If some odd denominations in an issue cannot be avoided they are made early maturities. This is largely a matter of local discretion in the absence of limiting language in the enabling legislation.

(i) Date

While the true life of a bond begins with its sale to the first holder, even though it be dated much earlier, a date is a practical necessity in fixing maturities and interest installments. It is not considered that dating is a legal sine qua non. The date used should follow the authorization of the bonds but a discrepancy in this respect is not fatal so long as authorization precedes the marketing of the issue. State ex rel. City of Memphis v. Hackman, 273 Mo. 670, 202 S.W. 7 (1918). It is an advantage to

bidders to have bonds dated as near as may be to the delivery date in order to minimize the accrued interest the purchaser must pay. (This is a simple method of interest adjustment since the holder will collect the full amount of the current interest installment for the period during which delivery is made.) If delivery is made after one or more interest installment periods, from date of the bonds, has run, the overdue coupons are detached and destroyed prior to delivery of the bonds.

(j) Execution

A municipal bond must be duly signed upon behalf of the borrower to bring the obligation into existence. The local governing body has the authority to designate the officer or officers to sign, unless the charter or enabling statute speaks to the point. There has been some question in the past as to whether, in case the officers to sign are designated by law, the persons who sign must hold the offices both at the time of signing and that of delivery. See II Dillon, Mun.Corps. § 888 (5th ed. 1911). This can be obviated, as in the North Carolina Municipal Finance Act, by expressly authorizing delivery notwithstanding changes in office. Coupons simply bear facsimile signatures; manual signing would be altogether too onerous.

A bond in the common law sense is an instrument under seal. In this context a statute authorizing a local unit to issue bonds would doubtless have reference to sealed instruments. While no recent cases in point have been found, there is authority that failure to impress the corporate seal does not render a municipal bond unenforceable. The cases are collected in II Dillon, Mun. Corps. § 889 (5th ed. 1911). Modern enabling statutes commonly require that bonds of a local unit bear a seal. See the N. C. Municipal Finance Act, Gen.Stat. of N. C. § 160-393 (1943). The seal serves as additional authentication supporting the primary act of signing by the appropriate officer or officers. This suggests that the statutory provision should be deemed directory, not mandatory. Town of Solon v. Williamsburgh Savings Bank, 114 N.Y. 122, 21 N.E. 168 (1889). Would the presence of a seal obviate the requirement of consideration. as in the case of a sealed private instrument at common law?

A local agency not endowed with corporate capacity may be empowered to issue bonds. If the statute be silent as to seal that relieves the problem. One may find, however, that the use of the corporate seal of a related unit or official seal of an associated officer is required.

(k) More about Revenue Bonds

The following descriptive material is borrowed from the writer's paper on "Revenue Bond Sanctions," which appeared in 42 Columbia Law Review 395, 400–405 (1942), with a view to presenting a better view of the elements of revenue bond financing.

"Revenue bond financing is not something new in the land. As long ago as 1851 the New York legislature authorized the issuance of revenue certificates payable solely from surplus canal revenues to finance the completion and enlargement of the Erie Canal and the completion of the Genesee Valley and the Black River Canals.2 The courts were not receptive to the idea; it was decided in 1852 that such certificates involved an anticipation of surplus canal revenues contrary to a constitutional scheme for their direct use "in each fiscal year" for canal completion and were debts subject to the constitutional debt restrictions.³ The present revenue bond era began in the 1890's.4 It is familiar learning that the restraining influence of constitutional debt restrictions made municipalities cast about for just such a device. Special assessment obligations payable solely from assessments provided a suggestive analogy.5 Prior to the recent depression some development took place in the field; the use of supporting covenants as to rates, the handling of funds, continuous operation, against alienation, and so on, is not new.6 But the major impetus for the great outpouring of revenue bonds in late years

^{2 [}Footnotes renumbered.] N.Y.Laws 1851, c. 485.

³ Newell v. People ex rel. Phelps, 7 N.Y. 9 (1852); Rodman v. Munson, 13 Barb. 63 (N.Y.Sup.1852). See Knappen, Revenue Bonds and the Investor, 14 et seq. (1939). It was difficult for the majority in the Newell case to accommodate their thinking to the new type of public financing confronting them. And even the dissenting justice conceded that if the surplus revenues were under the control of the legislature and as such applicable by it to any state purpose, instead of being dedicated to canal completion by the constitution, the certificates would constitute state debt.

⁴ See the leading case of Winston v. City of Spokane, 12 Wash. 524, 41 P. 888 (1895), in which an issue of waterworks revenue obligations was upheld against the charge that it constituted debt within the meaning of the constitutional debt limitation. There was no enabling act but only the debt question appears to have been presented. For early statutes see Wash.Laws 1897, c. 112, p. 326 and Ill.Laws 1899, p. 104.

⁵Thus, in Winston v. City of Spokane, 12 Wash. 524, 41 P. 888 (1895), the court concluded that the debt problem was answered in principle for revenue obligations by an earlier favorable decision on warrants payable solely from special assessment proceeds. Baker v. City of Seattle, 2 Wash. 576, 27 P. 462 (1891).

⁶ The proposed water revenue bonds, which were held to be debts within the meahing of the Idaho constitutional debt limitation in Feil v. City of Coeur D'Alene, 23 Idaho 32, 129 P. 643 (1912), were to be supported by covenants as to rates and against alienation that read much like contemporary covenants.

has been federal subsidies and loans in aid of public works projects calculated to relieve unemployment and give business a generous transfusion. An already dark local debt picture meant that revenue bonds were simply a 'natural.'

"But, first a better description of the main features of a revenue bond contract as spelled out in the bond ordinance. resolution or indenture. Variations in law and practice do not permit dubbing these elements as typical or as presented in any regular order. We begin with the description, by definition, of the properties (for convenience, called the project) the revenues of which are to be the source of payment. This definition will commonly and should include after-acquired property.7 Then, there will be the general pledge of revenues corresponding roughly to the granting clause of a mortgage. The bonds are made payable solely from the revenues thus pledged and this is reflected in the promise to pay appearing in the bonds. The pledge is not of gross revenues. A pledge of gross revenues coupled with an unqualified covenant to operate continuously while any of the bonds or coupons remain outstanding might involve the incurring of debt within the meaning of constitutional debt restrictions, because it could be construed as a general undertaking to provide for maintenance and operation, the burden of which would be calculated to fall on the taxpayer.8 Thus, it will be provided that the bonds 'are payable solely from and secured by an irrevocable, exclusive first lien upon and pledge of' gross revenues 'after deduction of reasonable and proper expenses of operation and maintenance.'9 The reader will readily perceive the controlling practical necessity of thus keeping the goose alive.

⁷The doctrine of accession is not enough because additional real property and improvements upon it may be acquired later.

⁸ This, of course, would not be true in states in which contingent liabilities are not regarded as debts. Woodmansee v. Kansas City, 346 Mo. 919, 144 S. W.2d 137 (1940); Lillard v. Melton, 103 S.C. 10, 87 S.E. 421 (1915).

In Smith v. Town of Guin, 229 Ala. 61, 155 So. 865 (1934), an enabling act making debt service a first charge on gross revenues was held invalid as a town up to its debt limit on the theory that it created a contingent liability for operating expenses. But in the companion case of Bankhead v. Town of Sulligent, 229 Ala. 45, 155 So. 869 (1934), that ruling was disapproved in view of a provision of the act which authorized voluntary (unpledged) use of general municipal funds for maintenance and operation. Since only voluntary application of general funds was contemplated by the act no covenant as to operation, said the court, could entail general liability because unauthorized.

The problem can be obviated by stipulating expressly that the covenant as to operation is not to be construed to require the expenditure of non-project revenues.

⁹ Quoted from the bond form set out in the Agreement and Trust Indenture executed by The Central Nebraska Public Power and Irrigation District to secure \$19,793,000 of its Refunding Revenue Bonds, dated as of May 1, 1940, p.

"Provisions governing the handling of project revenues are given careful attention; often they are spun out in great detail. It may suffice to outline a relatively simple scheme, which contains the basic elements of more highly refined ones. It is first required that all project revenues be deposited as received in a primary special fund with an acceptable depositary, which will usually be the trustee under the ordinance, resolution or indenture, if provision is made for one. Expenses of operation and maintenance will be paid directly out of the primary fund or provision may be made for the setting up of a separate special 'operating fund' into which project revenues first flow until enough funds are on hand to cover running expenses for a short period (e.g., sixty days). Thereafter the first call on the primary fund is the keeping of the operating fund on this working level. After satisfying the paramount requirements for maintenance and operation the 'flow of funds,' as some bond men are wont to put it, continues into a bond and interest or redemption fund. Ordinarily, separate funds for principal and interest are not desirable, especially in the case of term as distinguished from serial bonds, because they increase the risk of interest defaults: a common fund means that in lean periods funds set aside to meet principal requirements can be used to make up interest fund deficiencies. 10 Periodic transfers from the primary to the bond and interest fund, commonly on a monthly basis, are required in amounts sufficient to meet current principal and interest requirements and to build up a reserve. Once a reserve equivalent to principal and interest requirements for, say, two years beyond the current bond year has been created, payments into it may be suspended. Any surplus in the primary fund remaining after meeting the operating fund and principal and interest fund requirements may be left at the disposal of the obligor.

"Although sometimes required by statute, 11 a depreciation fund is a dubious element of a revenue bond set-up. It may leave the margin between anticipated revenues and the aggregate of

In contrast with this type of provision is the pledge of "a fixed amount" of gross revenues sufficient to pay principal and interest as they become due. This is the sort of pledge used in Arkansas waterworks revenue bond issues. It takes priority over maintenance and operation by having gross revenues to the extent of the "fixed amount" paid currently into a bond and interest fund ahead of provision for maintenance and operation. It is not in terms a first lien upon all gross revenues but its position of priority makes it such, in effect. Since it runs counter to the practical economic priority of maintenance and operation it is a dubious device, at best, that adds nothing to the security.

 $^{^{10}}$ Admittedly the usual provision for a reserve for principal and interest provides a cushion that tends to obviate this point.

¹¹ E. g., Ark.Laws 1933, Act 131, § 3; Tex.Rev.Civ.Stat. (Vernon 1925) Art. 1113.

the demands of the various funds too thin. The bondholder is not concerned with renewing the life of the project beyond the self-liquidating period, and the borrower ought, in a self-liquidating venture, to be satisfied with project benefits simply for the normal life of the properties. Provision is often made for an additional special fund for extensions and improvements. From the bondholder's standpoint the object is to make provision for increasing the revenue-producing capacity of the project.

"The security is buttressed by a number of supporting cove-Conspicuously, the borrower undertakes to complete the construction or other acquisition of the project; to maintain it in good condition, and operate it continuously so long as any of the bonds, principal or interest, remain outstanding; to impose and collect rates and charges sufficient at all times to meet the requirements of the special funds as to maintenance and operation, debt service, and so on; to carry appropriate insurance upon the properties and in the case of loss to apply the insurance proceeds or permit them to be applied as stipulated; to furnish no free service and to pay out of general funds at a reasonable rate for such service as the borrower may obtain from the properties; to keep records and accounts and to furnish periodic financial statements to bondholders or their representatives: to permit inspection of properties and accounts by or upon behalf of bondholders; not to lease or encumber the properties or to alienate any substantial portion thereof,12 and not to issue additional bonds payable from revenues of the properties except on a junior lien basis.13

"Just what the 'lien upon and pledge of' revenues amount to remains to be demonstrated. It is clear that the bondholders acquire a contractual right to have revenues applied in accordance with the bond proceedings. Thus the basis is laid for specific performance as against the debtor. It is equally clear that there is no property in which the bondholders can claim a security interest at the time the contract is made. Future earnings are one form of after-acquired property. At what point after income is received by the debtor does something more than a contractual interest arise? Is it necessary that the income be in some wise reduced to possession by a representative of the bondholders? It is believed that the matter does not necessarily hinge upon proprietary notions in any event.

¹³ In larger issues guarded provision may be made for disposition of substantial properties, without which the project would remain a complete operating unit, as well as of obsolete or worn out equipment.

¹³ Indentures will usually include such additional covenants as an undertaking to cause the indenture to be recorded and a covenant for further assurance.

"With respect to income clauses in corporate mortgages it has been said, after a review of the cases:

Though income is after-acquired, the income clauses do not produce the same legal consequences as the pledge of tangible after-acquired property. True, both types of pledge created a contract right, but only in the latter case is that right effective before possession taken or delivered to defeat the rights of third parties.¹⁴

But that situation is a horse of another color. There, various classes of creditors of a private debtor may be competing for payment. Here, we are dealing with a public debtor and certain of its special revenues dedicated by statute or contract made under statutory authority to project purposes, including debt service. This is doubtless a devotion to public use that places such revenues beyond the reach of non-project creditors.15 Junior issues of revenue bonds, moreover, are expressly subordinated, under like authority, to the claims of prior issues. Thus the competitive factor is minimized by law or under its authority. A more crucial situation is presented where the debtor pays a non-project creditor voluntarily from project funds. Could that creditor be compelled at the behest of bondholders to disgorge where he had notice, not because the bondholders had a proprietary interest in the funds but because public funds may be expended only for the lawful objects to which they are appropriated 16—a proposition that the bondholders should have standing to assert."

(2) Bond Election

Whether or not electoral approval must be had before municipal bonds are issued is a matter which varies widely from state to state. So it is with the substance of the electoral requirements which do exist. In North Carolina, for example, there are two separate constitutional restrictions. Under Section 7 of Article VII bonds for other than necessary expenses must be approved by a vote of a majority of the qualified voters of the unit. Subject to exceptions which need not be noted here, bonds for necessary expenses in a principal amount in excess of two-thirds of the amount by which the unit's debt was reduced in the last preceding fiscal year must, under Section 4 of Article V, be approved by a simple majority of those voting at a bond election.

¹⁴ Israels and Kramer, The Significance of the Income Clause in a Corporate Mortgage (1930) 30 Columbia Law Rev. 488, 507–508.

¹⁵ See Fordham, "Methods of Enforcing Satisfaction of Obligations of Public Corporations" (1933) 33 Columbia Law Rev. 28, 29.

¹⁶ See Webb v. Port Commission of Morehead City, 205 N.C. 663, 674, 172 S.E. 377, 382 (1934).

See Twining v. City of Wilmington, 214 N.C. 655, 200 S.E. 416 (1939). In some states voting at bond elections is confined to property taxpaying voters. See Tex.Const. Art. VI, § 3a. Louisiana approval must be by a majority in number and amount (of assessed valuation) of the property taxpayers who are qualified voters. La.Const. of 1921, Art. XIV. § 14(a). If an election requirement in terms relates to the incurring of debt and does not refer to refunding bonds they are not within its coverage since they do not involve the creation of any new debt. Schuchman v. City of Pittsburgh, 351 Pa. 527, 41 A.2d 642, 157 A.L.R. 785 (1945). In Florida, however, if the refunding proceedings materially enlarge the security behind the bonds an election is deemed requisite. State v. City of Lakeland, 154 Fla. 137, 16 So.2d 924 (1944). In several states, including Ohio and Pennsylvania, electoral approval of bonds for original financing is required only where a certain percentage of taxable values will be exceeded. Ohio Gen.Code § 2293-14 et sea. (Page, 1937). Pa.Const., Art. IX, § 8. Revenue bonds are not generally subject to the requirement. The considerations affecting the question whether given obligations are debts for bond election purposes, are the same as those under debt limitations, a subject to which we shall turn shortly.

If the statute sets no limitation, how long may a local unit delay before issuing bonds approved by the voters? Periods as long as eleven years have been declared not unreasonable. Mere efflux of time is not the only factor. Conditions may have so changed that the integrity of a particular project for which bonds had been voted could not be preserved or the whole system of financing and administering a public improvement such as roads has been changed since the voters gave general approval to a bond issue for road construction. Sparks v. Sparks. 300 Kv. 392, 189 S.W.2d 354 (1945), involved a road and bridge bond issue of the latter type. The delay covered a long span of twentyfive years. In what was patently a friendly declaratory judgment proceeding brought by taxpayers of the county concerned against the appropriate county officers, it was determined, on appeal, that the delay was unreasonable. A portion of the opinion, in which earlier cases are reviewed, reads as follows:

"In Young v. Fiscal Court of Trimble County, 190 Ky. 604, 227 S.W. 1009, it was held that the fiscal court of a county is not compelled to issue at one time the full amount of the bonds authorized at a duly held election, and that a reasonable time will be allowed within which to dispose of the remaining portion after issuance and sale of another portion. One-half of the authorized bond issue was sold a few months after the election, and more than 4 years thereafter the fiscal court proposed to issue and sell

a part of the remaining one-half. It was held that the lapse of time between the issues was not unreasonable. In Hager v. Board of Education, 254 Ky. 791, 72 S.W.2d 475, a bond issue of \$500,000 for school purposes was authorized at an election held in November, 1929. \$100,000 of the bonds were issued at once. On February 27, 1934, the Board of Education requested the city to pass the necessary ordinances to issue and sell another \$103,000 of the authorized bond issue of 1929. It was held that the Board of Education was not precluded by the lapse of time from requiring the city to issue the bonds. . . .

"In Runyon v. Simpson, 270 Ky. 646, 110 S.W.2d 440, a lapse of nearly 8 years between the election authorizing a school bond issue and the proposed issue and sale of bonds, in addition to two previous issues, was held not an unreasonable delay. In Weathers v. Todd County, 271 Ky. 172, 111 S.W.2d 638, \$300,000 of road and bridge bonds were authorized at an election held July 20, 1926. \$283,000 of the bonds were issued at various times between the day of the election and July 1, 1931. On October 20, 1936, the fiscal court, by resolution, proposed to issue the remaining \$17,000 of the bonds authorized at the 1926 election. A group of taxpayers sought to enjoin the issuance of the bonds on the ground, among others, that the fiscal court had abandoned its authority to issue the bonds by reason of the lapse of time between the last issue and the date of the proposed issue. It was held that the delay was not unreasonable. In Jonson v. Fiscal Court of Muhlenberg County, 272 Ky. 9, 113 S.W. 453, \$500,000 of road and bridge bonds were authorized at an election held in August, 1926. During the years 1927 to 1935, inclusive, \$436,000 of the bonds were sold. There were eight separate issues. In November, 1937, the fiscal court adopted a resolution providing for the issuance and sale of \$37,000 of the remaining bonds which had been expressly allocated by the petition calling the election to the construction of a particular road. was held that the delay in issuing the bonds was not unreasonable.

"In all the cases dealing with the question, the court has said, or implied, that a county or municipality may issue voted bonds as needed within a reasonable time, but there does not seem to be any hard or fast rule as to what constitutes a reasonable time within which the bonds must be issued. So far as our investigation discloses, the greatest length of time between the election and the issuance of the bonds which has been held reasonable is 11 years in Jonson v. Fiscal Court of Muhlenberg County, supra. Time is not the only element to be considered in determining the reasonableness of the delay. Conditions may have so changed as to render the issuance of the bonds inequitable. Ordinarily

the bond issue is voted with the intention that the bonds shall be sold and the proceeds applied to the purpose intended with reasonable promptness, and not with the intention that future generations shall both receive the benefits and bear the burdens. The bonds are voted in the light of conditions and needs as they then exist. When the \$125,000 bond issue was authorized by the voters of Jackson county in 1919, the state was constructing roads under a plan wholly different from the plan now followed. Then the State Highway Commission required the various counties to furnish a portion of the cost of construction of state projects, and in many counties bond issues were voted in order to obtain state highways and to relieve the counties of future maintenance charges. The petition in the case before us states only the bare facts heretofore recited, but it appears that the state has constructed the main arterial highways through the county, and that the proceeds of the proposed issue of bonds will be used to construct and improve the secondary roads. the annotation in 135 A.L.R. 768, the cases dealing with the effect of delay after authorization by the voters on the issuance of bonds by a governmental unit are collected. The greatest delay held reasonable by the courts is 11 years in Jonson v. Fiscal Court, 272 Ky. 9, 113 S.W.2d 453, and Stokes v. Montgomery, 203 Ala. 307, 82 So. 663. In the Stokes case a bond issue for a hospital was approved by the voters in 1908, and the Board of Commissioners of the city did not undertake to issue the bonds until 1919. It was held the delay was not unreasonable. In a later Alabama case, Fuller v. Knight, 241 Ala. 257, 2 So.2d 605, 611, 135 A.L.R. 760, a delay of 27 years in issuing bonds in the amount of \$40,000, the remainder of a \$200,000 bond issue authorized by the voters of a county for the purpose of constructing public roads in the county, was held unreasonable. . . . "

Uncertainties of the sort presented in the Sparks case should be and in some states have been, dispelled by positive law. The North Carolina Municipal Finance Act sets a time limit referrable to the effective date of the bond ordinance. Bonds may be issued within three years from that time. Gen.Stats. of N.C. § 160–389 (1943). The Ohio Uniform Bond Act provides that no voted bonds shall be issued after the first day of the fourth January after the bond election, but litigation concerning the project or bonds suspends the running of the period. Ohio Gen. Code § 2293–23b (Page, Supp. 1947).

Possibilities of error in the calling and conducting of bond elections are great. The student can get a good general idea of the steps involved in a relatively simple election pattern from the transcript. Irregularities may be obviated by one or another of the general investors' safeguards to be considered later. There is

also a widely-recognized proposition that procedural irregularities which could not have affected the result of a bond election do not go to its validity. I Dillon, Mun. Corps. § 374 et seq. (5th ed. 1911). Contra: Sessler v. Partlow, 126 W.Va. 232, 27 S.E.2d 829 (1943). Especially is this true where questions are not raised until the bonds are outstanding. It is safe to say as a matter of common sense that procedural irregularities are more likely to be considered fatal in cases where the issue is raised before bonds have been issued.

(3) Tax and Debt Limitations

Marketwise, there is an important advantage in a legal pattern which places no ceiling on debt service taxes. If there is an applicable tax limit, moreover, it will operate, in effect, as a debt limitation, since provision for payment is obviously indispensable. The provisions of sections 4 and 5 of Article XI of the Constitution of Texas are illustrative. The contract clause of the Federal Constitution (Art. I, § 10) precludes the application of a new levy limitation in such a way as to affect materially provision for payment of pre-existing bonds in accordance with the law as it existed when they were issued. Von Hoffman v. City of Quincy, 4 Wall. 535, 18 L.Ed. 405 (1867). And see Bee v. City of Huntington, 114 W.Va. 40, 171 S.E. 539 (1933).

If a bond issue is subject to a tax limitation, the approving opinion of bond counsel will call attention to the existence of the limitation but it is not customary to state specifically what the ceiling is.

In the past, at least, the most important restriction upon the creation of local debt has been the limitation based on the so-called "debt-to-property" ratio, under which indebtedness is limited to a stated percentage of the assessed value of taxable property in the unit. The weaknesses of the device have been pointed out by L. A. Shattuck, Jr., in Municipal Indebtedness, A Study of the Debt-to-Property Ratio, 58 Johns Hopkins University Studies in Historical and Political Science No. 2 (1940). There are many variations. In West Virginia, for example, the maximum is five per centum and this includes both funded and unfunded debt. W. Va. Const., Art. X, § 8. In Louisiana bonds may be issued in amounts up to ten per centum of taxable values for each of numerous authorized purposes of issue. La.Const. of 1921, Art. XIV, § 14(f).

As will be made apparent by the case which follows, creation of overlying or overlapping local units has been a very effective way of circumventing debt limits. But see McCabe v. Gross, 274 N.Y. 39, 8 N.E.2d 269 (1937), and N.Y.Const. Art. 8, § 4, as amended

in 1938. The South Carolina Constitution contains an unusual provision, which sets an over-all debt limit for overlying and overlapping local units, Art. X, § 5. It has, however, been cut to ribbons by numerous amendments making exceptions as to particular units and weakened even further by judicial interpretation. See Elliott v. Hayward, 127 S.C. 468, 121 S.E. 257 (1924).

KELLEY v. BRUNSWICK SCHOOL DISTRICT

Supreme Judicial Court of Maine, 1936. 134 Me. 414, 187 A. 703.

Dunn, Chief Justice. In 1935 the Legislature, by special act (Priv. & Sp.Laws, c. 70)—the law became effective July 6—created the Brunswick School District, which, for brevity, will be spoken of as district. The first section of the act, so far as recital is essential, reads as follows: "The inhabitants and territory within the town of Brunswick are hereby created a body politic and corporate under the name of Brunswick School District for the purpose of acquiring property within the said town for school purposes; erecting, enlarging, repairing, equipping and maintaining on said property a school building; and for the purpose of maintaining a secondary school, with the right to lease or let said property to said town; all for the benefit of the inhabitants of said town."

Legislative action was made to depend upon the wishes of the listed voters in the proposed district. The vote of a majority of the electors, in case of an election for the expression of their choice, and an annual meeting of the inhabitants of the town of Brunswick, hereinafter generally called town, being held on the same day, was defined as necessary to decision; whereas if the election was on any day before that of the next town meeting (such meetings are by statute, R.S., c. 5, § 12, in March), vote of one-third of all the voters in the territorial division would suffice. The latter method was followed October 14, 1935.

At the same election, five trustees were chosen by plurality vote.

The legislation empowers borrowing on the faith and credit of the district a sum not in excess of \$250,000, to be met, together with interest, from the levying, annually, over a period of years, of taxes upon its polls and estates.

The borrowed money must be expended for the erection and equipment of a building in the district for a secondary school.

When the money shall have been repaid, and every indebtedness of the district discharged, the property whatsoever which it may at that time hold, is, under the terms of the act, to be transferred to the town. The trustees shall then cease to function, the district itself become legally defunct, and "all of the duties, manage-

ment, care and maintenance shall revert to the school board of the town of Brunswick." Section 7, 1935 Laws, supra.

The trustees have made part payment of the purchase price of a building site; they propose to complete that transaction, and, on making loans in supplement to an expected grant from the Federal Public Works Administration, to contract for a high school, the total expense, inclusive of any grant, to be within the sanction of the act.

Ten individual taxpayers, alleging themselves inhabitants of the town, and of the district superimposed upon it, the area of the two being identical, instituted this suit against the district, and, by designation, its trustees, to test the validity of the statute; and for relief by injunction.

Jurisdictional allegations are sufficient. R.S., c. 91, § 36, cl. 13; Crabtree v. Ayer, 122 Me. 18, 118 A. 790; Hamilton v. Portland Pier Site District, 120 Me. 15, 112 A. 836.

The cause was heard on the bill, answers, replication, and facts agreed on, and reported to the full court. . . .

Municipal corporations organized for different purposes may include the same territory, as a city and a county, or a school district. McQuillin, Mun.Corp.(2d Ed.) Vol. 1, § 283. Two authorities cannot exercise power in the same area, over the same subject, at the same time. Dillon, Mun.Corp.(4th Ed.) vol. 1, § 184; Rex v. Passmore, 3 T.R. 199; Paterson v. Society, 24 N.J.L., 385. But identity of territory, putting one municipal corporation, full or quasi, where another is, is immaterial, if the units are for distinct and different purposes. South Park Com'rs v. Chicago, etc., R. Co., 286 Ill. 504, 122 N.E. 89. . . .

And finally the act is assailed as having no purpose other than to permit accomplishing, indirectly, what, because of the 5 per centum limit of present indebtedness organic in our law (provisos are not of relevancy), the town of Brunswick could not do directly. Thirty-Fourth Amendment, Constitution of Maine.

The constitutional debt limit provision confines the indebtedness of cities and towns within prescribed bounds. Loose construction should not be allowed to weaken the force or broaden the extent of that provision. Browne v. Boston, 179 Mass. 321, 60 N.E. 934; Reynolds v. Waterville, 92 Me. 292, 42 A. 553.

Where some independent board or commission, which, though technically a separate corporation, is only an agency of the town or city, incurs or seeks to incur a debt, the courts ought to look behind fiction to see what the real fact is. Browne v. Boston, supra; Reynolds v. Waterville, supra. See, too, In re Opinion of the Justices, 99 Me. 515, 60 A. 85.

Such is the correct rule and principle; but the courts may not, absent express constitutional limitations, entirely deny the power of the Legislature to create, wholly or partly, in town or city limits, different public corporate bodies, and to make clear that their debts are to be regarded as those of independent corporations. Wilson v. Board of Trustees, 133 Ill. 443, 27 N.E. 203; Board of Education v. Upham, 357 Ill. 263, 191 N.E. 876, 94 A.L.R. 813; Kennebec Water District v. Waterville, 96 Me. 234, 52 A. 774; Augusta v. Augusta Water District, 101 Me. 148, 63 A. 663. The statement in the case latest cited, as to the same territorial coexistence of two public corporations, while obiter dictum, is in point.

The Constitution of Maine contains no specific provision that wherever there shall be several political divisions, inclusive of the same territory or parts thereof, invested with power to lay a tax or incur a debt, then the aggregate indebtedness of all the separate units should be taken, in ascertaining the debt limit of one of them.

The Maine Legislature, with regard to incorporating corporations purely public, is of virtually unlimited power. It has created, to speak only of some, a local police corporation (Dyar v. Farmington Village Corporation, 70 Me. 515); fire protection corporations (Dyar v. Farmington Village Corporation, supra; Mayo v. Dover & Foxcroft Village Fire Company, 96 Me. 539, 53 A. 62); a forestry district (Sandy River Plantation v. Lewis, 109 Me. 472, 84 A. 995); a bridge district (Crabtree v. Ayer, supra); water districts (Kennebec Water District v. Waterville and Augusta v. Augusta Water District, both of earlier citation); and authorized them to administer public affairs. The Legislature has even incorporated a village corporation enabled, with other prerogatives, to build a hall, part of which it occupies, and part of which it rents. Camden v. Camden Village Corporation, 77 Me. 530, 1 A. 689.

In Malaley v. Marysville, 37 Cal.App. 638, 174 P. 367, 369, the court, quoting from a previous case (Los Angeles School Dist. v. Longden, 148 Cal. 380, 83 P. 246), says: "'What, therefore, the Wetmore Case (99 Cal. 146 [33 P. 769]) and the Law Case (144 Cal. 384 [77 P. 1014]) decided was that the erection of schoolhouses within the corporate limits of a municipality was justly to be regarded as a municipal affair, and that the city therefore, as such, could create a bonded indebtedness for such and like purposes, even though power to do the same thing was, under the general school system of the state, vested in a school district which, while occupying the same territory as that of the city, was still in point of law a distinct corporate entity. It follows therefore that the declaration of this court that the issuing

of bonds for the building of schoolhouses by a city is a municipal affair constitutes in no sense a negation of the fact that another corporate entity—the school district—may, under the general school system of the state, do the same thing for the same purpose."

The case proceeds: "That, notwithstanding that they are different and separate or distinct corporate entities, a municipality and a school district, the territorial boundaries of which are the same as those of the city, may, if the Legislature elects to give them the right to do so, exercise precisely the same identical power with respect to matters connected with and calculated to further the interests of the public school system."

In Detroit, Michigan, the city and the school district coincide geographically. Each is an independent corporation. Attorney General (Kuhn) v. Thompson, 168 Mich. 511, 134 N.W. 722, 726. The Michigan court, recognizing that there cannot be, over the same territory, at the same time, two legal and effective corporations with the same governmental powers, points out that where the corporations are organized for different purposes, have different rights and duties relating to different matters, they may, and often do, occupy one territory, working in harmony, each within its scope. Attorney General (Kuhn) v. Thompson, supra. See McQuillin, Mun. Corp., supra.

McCurdy v. Board of Education of Bloomington, 359 III. 188, 194 N.E. 287, holds that a school district and a city with conterminous boundaries are, in the law, apart from each other.

In People v. Bowman, 247 Ill. 276, 93 N.E. 244, 248, it is said: "While two municipal corporations cannot have jurisdiction and control, at one time, of the same territory for the same purpose, no constitutional objection exists to the power of the Legislature to authorize the formation of two municipal corporations in the same territory at the same time for different purposes, and to authorize them to co-operate, so far as co-operation may be consistent with, or desirable for, the accomplishment of their respective purposes."

An able annotator thus expresses the result of his examination of the reported cases throughout the country: "The general rule is that, in applying to constitutional or statutory debt-limit provisions to separate and distinct political units with identical boundaries, exercising different functions, only the indebtedness of the political unit in question can be considered, and the debts of the other independent political units should be excluded." 94 A.L.R. 818.

The annotation collects and discusses, among others, cases from Illinois, Indiana, Kentucky, Maine, Michigan, North Dakota, Pennsylvania, South Dakota, Washington, and Wisconsin.

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In departure from the general rule, Texas holds that the indebtedness of all the separate coterminous political units must be added together, to find out whether one of them has exceeded its debt limit. Simmons v. Lightfoot, 105 Tex. 212, 146 S.W. 871. This rule has been necessarily applied in South Carolina, by reason of the language of its constitutional debt limit provision. Todd v. Laurens, 48 S.C. 395, 26 S.E. 682.

A legislative act should not be declared unconstitutional unless it is clearly so. Ulmer v. Lime Rock R. Co., 98 Me. 579, 57 A. 1001, 66 L.R.A. 387.

This court cannot say that chapter 70 of the Special Laws of 1935 palpably contravenes the Maine Constitution.

On the whole case, which has been argued on both sides with ability and zeal, the complainants' bill is not sustainable.

The mandate should be

Bill dismissed, on the merits.17

Under the common type of debt limitation, stated in terms of a percentage of taxable values, debt may mean one thing for purposes of computing outstanding debt and something else in determining what is new debt. Thus, floating debt arising out of regular governmental operations may not have been new debt when the liability was incurred but constitute, after the end of the fiscal year, outstanding debt to be taken into account in applying a debt limit. Even as to new debt, however, the term "debt" as used in constitutional and statutory debt limitations is held to have a more restricted meaning than it carries in its ordinary legal sense. The controlling object of debt limits has long been conceived to be the prevention of excessive local tax levies. Bank for Savings v. Grace, 102 N.Y. 313, 318, 7 N.E. 162, 163 (1886).

(a) Current Expenses

A literal interpretation of "debt" would be impractical; it would even embrace the use of credit for routine operating expenses, although no violence were done to the policy enunciated in the Grace case. The courts have had the good sense to lay it down that general liabilities incurred for current operations, which are within budgeted revenues, are not new debt. For a collection of

¹⁷ The dissenting opinion of Justice Manser is omitted.

cases see I Dillon, Mun.Corps. § 195 (5th ed. 1911) and 6 Mc-Quillin, Mun.Corps. § 2378 (Rev. vol. 1937). It has been determined, however, that general obligation tax-anticipation borrowing to put a unit in funds to meet operating expenses does create new debt. Butts County v. Jackson Banking Co., 129 Ga. 801, 60 S.E. 149 (1908). The particular debt limitation provision may expressly except this type of borrowing. See N.C.Const. Art. V, § 4, and City of Georgetown v. Elliott, 95 F.2d 774 (C.C.A. 4th, 1938), set out herein at p. 477.

(b) Continuing Contracts

It may be advantageous to a local unit to make a contract covering the furnishing of current services or supplies for a period of years. There is substantial authority that the current expense rule applies on the theory that the unit is simply bound to pay periodically for the services as rendered or supplies as furnished and is not indebted from the outset for the full amount involved. Walla Walla City v. Walla Walla Water Co., 172 U.S. 1, 19 S.Ct. 77 (1898); Scranton Electric Co. v. Old Forge Borough, 309 Pa. 73, 163 A. 154 (1932).

In a number of older cases the courts have refused to apply this idea to capital outlay. See I Jones, Bonds and Bond Securities § 107 (4th ed. 1935). A usual feature was a provision that when a certain amount (equivalent to the purchase price) had been paid, title should pass to the local unit or it should then have the option to buy at a nominal price.

Recently the Supreme Court of South Dakota applied the continuing contract rule to a situation which involved the substance of capital outlay although there was no provision for title ever passing to the local unit. Robbins v. City of Rapid City, 23 N.W. 2d 144 (S.D. 1946). The Federal Government, through the Secretary of the Interior, made a contract with the City of Rapid City the object of which was to furnish the latter an adequate water supply. The city had an existing water works system. The contract was summarized in the opinion (at 23 N.W.2d 147) as follows:

"The contract comprises over thirty typewritten pages and it is unnecessary to set it forth in this opinion; its basic purpose and provisions, so far as the city is concerned, may be briefly summarized as follows: The United States agrees to construct a dam and storage reservoir of approximately 15,000 acre-feet capacity, in said contract and hereinafter referred to as the 'joint works,' in order to make a water supply available to the city, and stipulates that all water that becomes available through the construction and operation thereof shall be available to said city and district and

that said city shall be allotted for domestic, municipal and industrial purposes a senior priority to and preferred use of 7,000 acre feet to be released all as provided in said contract. The city, 'for its supply of water,' agrees to pay to the United States the sum of \$500,000 in forty successive, equal, annual installments of \$12,500 each, without interest, and operation and maintenance charges of the joint works. The obligation of the municipality, exclusive of such operation and maintenance charges, shall not exceed the cost of such joint works as finally determined by the Secretary of the Interior and shall in no event exceed the sum of \$500,000."

Under this scheme the city was to pay for the project but never own it. Section 4 of Article XIII of the South Dakota Constitution requires electoral approval for city debts. There was an election in this case but it was alleged to be fatally irregular since it was held before the resolution calling it took effect. Taxpayers sought to enjoin performance of the contract. The court assumed, for the argument, that the election was abortive, but sustained the arrangement on the continuing contract theory; the city was simply buying water.

A less plausible scheme, which actually involved acquisition of title by an Oklahoma city fell under attack in the courts. City of McAlester v. State ex rel. Board of Public Affairs, 195 Okl. 1, 154 P.2d 579 (1945). A state agency agreed to construct a lake as a part of a city's water system and the city agreed to furnish water at its expense to a state institution over a period of years until the cost of the project was thereby repaid to the state. Oklahoma is one of several states whose debt limitations confine the incurring of local debt in any year, without electoral approval, to an amount not exceeding the income and revenue provided for that year. Okla.Const., Art. 10, § 26. It was determined that the liability under the contract would exceed current revenues and that it was immaterial that payment was to be in water instead of cash.

(c) Instalment Contracts

The continuing contract theory has been applied to uphold leases by local units of capital facilities. The idea is that the unit is merely paying for use from year to year as it is enjoyed. Where the so-called rent is thought to be merely disguised instalment payments on the purchase price the opposite result is likely to be reached. The ingenuity of the bar has presented the problem with manifold variations. If title is to pass upon payment of aggregate rentals, the scheme is transparent, particularly where the amount has the economic earmarks of a purchase price. If the unit is given an option to buy at a nominal price or at a larger one against which rentals are credited the argument that there is

merely a contingent liability entirely within the control of the unit must be balanced against the contention that the option is a sham since purchase must be effected to protect the investment represented by the rental payments.

CITY OF LOS ANGELES v. OFFNER

Supreme Court of California, 1942. 19 Cal.2d 483, 122 P.2d 14.

GIBSON, CHIEF JUSTICE. By this proceeding in mandamus the city of Los Angeles seeks to compel the respondent as secretary of its board of public works, to post and publish notices inviting sealed bids for the construction and leasing to the city of a rubbish incinerator. The respondent demurred to the petition, contending that the proposed lease will create a municipal indebtedness or liability which will exceed in the year of its execution the income and revenue then available to the city in violation of article XI, section 18, of the state Constitution.

The Board of Public Works of the City of Los Angeles by resolution has adopted specifications for the construction and leasing to the city of a rubbish incinerator, and for the receipt of bids therefor. The agreements to be entered into between the city and the successful bidder are to provide for the leasing by the city to such bidder of certain city-owned property for a period of ten years at a rental of \$1 a month, it being contemplated that the contractor will construct the incinerator on the property within nine months thereafter. Simultaneously with the execution of this lease and construction contract, the successful bidder is to execute a lease to the city of the demised premises with the incinerator thereon for a period of nine years and nine months, the city to pay a monthly rental to be specified in the bid. The city is to be given an option to purchase the incinerator at various intervals during the term of the lease with a minimum option price for each interval being specified by the bidder. If the city elects to purchase, the option price shall be the then appraised value of the incinerator as determined by three independent appraisers, provided only that it shall not be lower than the minimum price specified in the bid. Title to the incinerator is to remain in the successful bidder unless the city elects to purchase. The land lease from the city is to run for a period of three months after the expiration of the incinerator lease and option agreement from the successful bidder to the city, thus affording the bidder time within which to remove the incinerator, a right expressly reserved to him in the event the city elects not to exercise the option to purchase.

It is alleged in the petition "that the present rubbish incinerator facilities of petitioner City are inadequate and obsolete, and constitute a fire hazard, and that the public health and safety demand the immediate construction of a large, modern rubbish incinerator."

In refusing to post and publish notices inviting sealed bids for the construction and leasing of such incinerator, the respondent secretary challenges the validity of the proposed agreements on the ground that they would violate the constitutional provision which prohibits a city from incurring an indebtedness or liability in any year in excess of the income and revenue provided for that year without the assent of two-thirds of the qualified electors of the city. In this connection the petition alleges that while the aggregate of the rentals that might accrue under the lease, together with other municipal debts and liabilities incurred during the fiscal year when the leases and contract will be entered into. will exceed the income and revenue for that year, the amount of rentals that the city may be required to pay in any single fiscal year, together with its other debts and liabilities, will not exceed the income and revenue provided for such year. The question for consideration, therefore, is whether the city in entering into the proposed leases and contract will incur an indebtedness or liability for the rentals for the entire term or whether such action will create an indebtedness or liability in that year for such rentals only as will become payable during that fiscal year. Or, as respondent states, whether "such an arrangement is equivalent in reality to an installment contract for the purchase of said incinerator over a period of nine years and nine months."

It has been held generally in the numerous cases that have come before this court involving leases and agreements containing options to purchase that if the lease or other agreement is entered into in good faith and creates no immediate indebtedness for the aggregate installments therein provided for but, on the contrary, confines liability to each installment as it falls due and each year's payment is for the consideration actually furnished that year, no violence is done to the constitutional provision. Mc-Bean v. City of Fresno, 112 Cal. 159, 44 P. 358, 31 L.R.A. 794, 53 Am.St.Rep. 191; Smilie v. Fresno County, 112 Cal. 311, 44 P. 556: Higgins v. San Diego Water Co., 118 Cal. 524, 553, 45 P. 824, 50 P. 670; Doland v. Clark, 143 Cal. 176, 180, 181, 76 P. 958; Krenwinkle v. City of Los Angeles, 4 Cal.2d 611, 613. 51 P.2d 1098. If, however, the instrument creates a full and complete liability upon its execution, or if its designation as a "lease" is a subterfuge and it is actually a conditional sales contract in which the "rentals" are installment payments on the purchase price for the aggregate of which an immediate and present indebtedness or liability exceeding the constitutional limitation arises against the public entity, the contract is void. Chester v.

Carmichael, 187 Cal. 287, 201 P. 925; City and County of San Francisco v. Boyler, 195 Cal. 426, 233 P. 965; Mahoney v. City and County of San Francisco, 201 Cal. 248, 257 P. 49; Garrett v. Swanton, 216 Cal. 220, 13 P.2d 725.

The rule as applied to each of these situations is well stated in Garrett v. Swanton, supra, 216 Cal. at page 226, 13 P.2d at page 728, as follows: "The law is well settled in this state that installment contracts of any kind, where the installment payments are to be made over a period of years and are to be paid out of the ordinary revenue and income of a city, where each installment is not in payment of the consideration furnished that year, and the total amount of said installments, when coupled with the other expenditures, exceeds the yearly income, are violative of the constitutional provision in question unless approved by a popular vote. This is so whether the contract be denominated a mortgage, lease, or conditional sale. . . . It is true that under the doctrine enunciated in McBean v. City of Fresno, 112 Cal. 159, 44 P. 358, 31 L.R.A. 794, 53 Am.St.Rep. 191 tracts for the furnishing of property in the future have been upheld, but only where no liability or indebtedness came into existence until the consideration was actually furnished. In other words, such contracts are valid where each year's installment is within the city's income, and where each year's payment is for the consideration actually furnished that year." (Italics added.)

We are satisfied that the proposed agreements involved in the proceeding now before us are within the rule as applied in the McBean and Krenwinkle cases and are therefore valid and do not violate the debt limitation provision of the constitution. transaction here challenged constitutes in reality a lease with reasonable terms and option to purchase. We find no evident present intention on the part of the city to purchase the incinerator. The rentals are for a definite amount, to be specified in the bid. The amount of the rentals and the minimum option prices are to be determined by competitive bidding, but in no event is the city to have the right to purchase the incinerator at less than its fair appraised value at the time it elects to purchase. Under such circumstances, the city is not required to exercise the option in order to protect its prior investment in the form of rental payments. The rental payments are intended to represent the fair rental value of the incinerator and the option purchase price is intended to represent the then fair value of the incinerator itself. The city after learning the appraised value may decline to purchase under the option and continue with the lease. If the city has not exercised the option to purchase during the term of the lease, provision has been made for the removal of the incinerator by the lessor. In view of the admitted fact that the amount of rentals that the city may be required to pay in any single fiscal year, together with its other debts and liabilities will not exceed its income and revenue for such year, it cannot be said that the proposed agreements violate the debt limitation provision of the Constitution.

Let a peremptory writ of mandate issue as prayed for.

(d) Contingent Claims

"The decisions of courts of other states on the question whether contingent liabilities are debts for purposes of constitutional debt limits are not in harmony.\(^{18}\) Probably the most satisfactory test that has been enunciated is whether the contingency is a matter subject to the control of the unit. If the unit is committed from the start and the event upon which its liability becomes fixed is an external matter beyond its control, even though not bound to happen, it may be said that a debt is incurred ab initio, but if the unit is left to control the event no debt is incurred until the condition is met.\(^{19}\)"

W. H. Hoyt and J. B. Fordham, "Constitutional Restrictions upon Public Debt in North Carolina" 16 N.C.L.Rev. 329, 346 (1938). (Footnotes renumbered.) A recent case treating a contingent liability not strictly under the control of the borrower as not a debt is Woodmansee v. Kansas City, 346 Mo. 919, 144 S. W.2d 137 (1940).

(e) Cash on Hand

If a city issues \$2,000,000 of city hall bonds and then lets contracts for the construction and equipment of the building which aggregate \$1,950,000 it has actually contracted \$3,950,000 of liabilities. Since, however, the bond proceeds are on hand and earmarked for the project, the letting of the contracts does not create debt within the meaning of constitutional debt limitations. Levy v. McClellan, 196 N.Y. 178, 89 N.E. 569 (1909).

(f) Non-contract Liabilities

As a loose generalization involuntary liabilities are not debts in the sense of new debt under debt limitations. It is a pretty safe proposition as to ordinary tort liability but far from reliable when

¹⁸ It is held in South Carolina that they are not debts. Lillard v. Melton, 103 S.C. 10, 87 S.E. 421 (1915). Contra: Smith v. Guin, 229 Ala. 61, 155 So. 865 (1934). See generally I Jones, Bonds and Bond Securities, § 94 (4th ed. 1935). 6 McQuillin, Mun.Corps. § 2377 (Rev. vol. 1937).

¹⁹ This is the Iowa theory of the matter. Burlington Water Co. v. Woodward, 49 Iowa 58 (1878). See also I Dillon, Mun.Corps. § 200 (5th ed. 1911).

it comes to quasi-contractual claims and liabilities imposed by statute. See Hovt and Fordham, op. cit. supra, at 350 et seg. As indicated in the leading case of Litchfield v. Ballou, 114 U.S. 190, 5 S.Ct. 820 (1885), if quasi-contractual recovery is permitted where bonds are unenforceable because issued in excess of the limit the effect is to defeat the limitation. It might well be otherwise as to situations where debt limitation policy is not involved, as where goods or service had been furnished the unit by mistake and not pursuant to contract. As for statutory liabilities it is quite apparent that debt limitation policy could be flouted if the legislature could compel the assumption of a liability which a local unit could not voluntarily incur consistently with a debt limitation provision. On the other hand, statutes imposing absolute liability upon local units regardless of fault, of which enactments making municipalities liable for any injuries to travelers due to defects in streets and mob violence statutes are examples, do not run counter to debt limitation policy.

The cases involving special assessment bonds payable solely from special assessments, which the local units have not laid or enforced in keeping with statute are of interest here. General liability has been imposed on the theory of an implied contract to levy and enforce valid assessments. Bessemer Investment Co. v. City of Chester, 113 F.2d 571 (C.C.A.3rd, 1940). Again, violation of the statutory duty has been treated as an actionable tort. Oklahoma City v. Orthwein, 258 F. 190 (C.C.A.8th, 1919). See also Knepfle v. City of Morehead, 301 Ky. 417, 192 S.W.2d 189 (1946). Do these decisions square with debt limitation policy?

(g) Obligations Payable from a Special Fund

Debt limitations have been directed toward keeping local tax levies in bounds. Special assessments are not taxes in this sense. So it long since came about that efforts were made, and successfully, to take the debt limit hurdle by making the contract for an improvement payable solely from special assessments or by providing project funds through the issuance of obligations payable solely from special assessments. For a collection of cases see Williams and Nehemkis, "Municipal Improvements as Affected by Constitutional Debt Limitations" 37 Col.L.Rev. 177, 188 (1937).

In 1902 the Supreme Court of Iowa embraced a theory which opened a wide avenue for evasion of the constitutional debt limitation governing municipalities. The court upheld a scheme under which provision was made for the payment of bonds, which, if debt, would exceed the limit, solely out of the proceeds of a continuing special ad valorem levy laid in advance for a period of years. Swanson v. City of Ottumwa, 118 Iowa 161, 91 N.W. 1048.

1051. The supporting theory was that the prior levy and appropriation of the continuing tax created a special fund which was an asset pledged to the payment of the bonds and stood on a footing with the special assessment cases. A month later the Circuit Court of Appeals reached a directly opposite conclusion on the same set of facts. City of Ottumwa v. City Water Supply Co., 119 F. 315 (C.C.A.8th, 1902). Does it make a difference that a special tax is the sole source of payment? That it is imposed in advance as a continuing levy instead of being levied from year to year? The Iowa Court no longer thinks so. The Swanson case was overruled in 1940. Brunk v. City of Des Moines, 228 Iowa 287, 291 N.W. 395. See collection of cases in Notes 92 A.L.R. 1299 (1934) and 134 A.L.R. 1399 (1941).

In South Carolina debt limitations have been avoided (or evaded, as you will) by issuing obligations payable from proceeds of income and excise taxes previously levied on a continuing basis. Earlier cases are cited in Arthur v. Johnston, 185 S.C. 324, 194 S.E. 151 (1937). Whether the courts of the state would uphold the application of the scheme to special ad valorem taxation remains to be seen.

"The not inconsiderable learning which has accumulated on the question of whether revenue bonds are debts in the sense of constitutional debt limitations is focalized in the so-called special fund doctrine. In its more general sense the gist of this doctrine as applied to revenue bonds, is that public obligations payable solely from a special fund derived from the revenues of the property or undertaking financed by such obligations are not debts within the meaning of a constitutional debt limitation. There are decisions on the subject from over half the states and not more than three can be listed as not having embraced the doctrine either with or without reservations.²⁰ The weight of authority supports the 'broad special fund doctrine,' the purport of which is that no debt is created so long as the special fund is derived from net non-tax revenues. The typical case is that where the net income from existing properties, improved with the aid of the revenue obligations, is included. It doubtless would apply where net revenues of distinct and independent property or serv-

^{20 [}Footnotes renumbered]. All but the most recent cases are collected by Foley, Revenue Financing of Public Enterprises (1936) 35 Mich.L.Rev. 1, app., and Williams and Nehemkis, "Municipal Improvements as Affected by Constitutional Debt Limitations" 37 Col.L.Rev. 177, 209 et seq. See also the collection of cases in Fairbanks, Morse & Co. v. Wagoner, 81 F.2d 209, 216 n. 4 (C.C.A. 10th, 1936). The dissenting states are Idaho: Feil v. Coeur D'Alene, 23 Idaho 32, 129 P. 643 (1912); Maryland: Baltimore v. Gill, 31 Md. 375 (1869); and New Jersey: Wilson v. State Water Supply Comm., 84 N.J.Eq. 150, 93 A. 732 (1915). Georgia has been put in this group by Williams and Nehemkis, op. cit. supra at 210.

ices are pledged.²¹ A few states, however, following the lead of Illinois,²² are committed to the 'restricted special fund doctrine,' ²³ which narrows the protection of the rule to obligations payable solely from the net revenues of the specific properties paid for with the proceeds of the obligations. The fundamental test under either view is whether the obligation is payable from taxes. It is held that since the prime object of debt limitations is to keep the tax burden in bounds only obligations payable from taxes are within their purview.²⁴ In an important sense general obligation municipal bonds are simply a means of anticipating the taxes of future years. But the restricted theory holds that to pledge revenues of existing properties is to require indirectly taxation to pay the revenue obligations since it absorbs net revenues of those existing properties which would otherwise go into the general fund of the unit in reduction of taxes.

"In 1903 the Supreme Court of North Carolina adopted the broad special fund doctrine. In Brockenbrough v. Board of Water Commissioners, it appeared that the city of Charlotte, acting under special enabling legislation, was about to issue revenue bonds without a vote of the people of the city to finance improvements to its existing water system. The bonds were payable from the revenues of the entire system and enjoyed the additional security of a mortgage upon the system as a whole. It was held that regardless of whether a water supply was to be deemed a necessary expense within the meaning of Section 7 of article VII of the constitution, the bonds were valid without

²¹ The point was noticed but not passed on in State v. Fort Pierce, 126 Fla. 184, 170 So. 742 (1936), where the net revenues of existing water and electric properties were pledged to pay bonds issued to finance improvements to the electric properties. Both properties were operated as a single system.

²² The leading case is Joliet v. Alexander, 194 III. 457, 62 N.E. 861 (1902).Cf. Hairgrove v. Jacksonville, 366 III. 163, 8 N.E.2d 187 (1937).

²³ See the collection of cases referred to in n. 72. See also Smith v. Waterworks Bd. of Cullman, 234 Ala. 418, 175 So. 380 (1937); Cartledge v. City Council of Augusta, 183 Ga. 414, 188 S.E. 675 (1936).

²⁴ See the oft-cited New York case, Bank for Saving v. Grace, 102 N.Y. 313, 318, 7 N.E. 162, (1886). This idea underlies the decision in Brockenbrough v. Board of Water Comm'rs, 134 N.C. 1, 46 S.E. 28 (1903).

²⁵ See note 24, supra.

²⁶ The defendant board, which was created a separate corporation by the revenue bond enabling statute, was authorized to take title and control over the old and new properties, and the bonds were to be issued in its name. The court treated these facts as immaterial for purposes of the case and decided it as though the city were acting directly.

²⁷ In a case decided only eighteen days later electric and water systems were held to be necessary expenses. Fawcett v. Mt. Airy, 134 N.C. 125, 45 S.E. 1029 (1903); overruling earlier decisions to the contrary. See the critical comment in Gray, Limitations on Taxing Power and Public Indebtedness § 1060 (1906).

electoral approval because they were not 'debts'. This decision goes beyond the broad special fund theory because the bonds were secured by a mortgage on existing property paid for by the tax-payers of the city. The opinion contains no comment on this aspect of the case.²⁸"

W. H. Hoyt and J. B. Fordham, "Constitutional Restrictions upon Public Debt in North Carolina" 16 N.C.L.Rev. 329, 347-349 (1938).

STRUBLE v. NELSON

Supreme Court of Minnesota, 1944. 217 Minn. 610, 15 N.W.2d 101.

Peterson, Justice. This is an appeal by plaintiff from an order sustaining defendants' demurrer to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action. The facts will be stated as they appear in the complaint.

Plaintiff brings the action as a taxpayer and water user of the village of Lake Park to restrain the village council from issuing without submission to popular vote revenue warrants payable solely from anticipated earnings of the village waterworks to pay for the installation of a water filtration and softening system as an improvement of and addition thereto. The resolution authorizing the issuance of the warrants recites that the installation is necessary in order to furnish an adequate and satisfactory water supply. The warrants do not obligate the village to pay the same in any other manner than that stated. The village has no bonded indebtedness. Among other things, the village covenanted with the holders of the warrants to create and maintain a fund to be known as the "Water Plant Revenue Fund," into which all receipts from the waterworks were to be paid and out of which, after payment of the expenses of operation and maintenance, the warrants were to be paid at the times and in the manner therein set forth; to maintain the rates charged water users in force at the time the resolution was adopted until the warrants shall have been paid; to pay into the fund five dollars per hydrant annually for water used by it; and to carry insurance on the waterworks against certain specified casualties, the proceeds of which in the event of loss were to be used either to repair and restore the plant or to pay and retire the warrants. The resolution insofar as it relates to hydrant rental provides:

". . . In order that the general inhabitants of the village shall pay for water service rendered by street sprinkling and

²⁸ If the mortgage was confined to the property acquired with the bond proceeds that would be a different matter, not involving an indirect tax burden. See Clarke v. S. C. Public Service Authority, 177 S.E. 427, 181 S.E. 481 (1935).

washing and in fighting fires and not charged or paid for through the charges heretofore made, an additional charge of \$5.00 per year for each fire hydrant is hereby imposed. Said charge shall be paid out of the general revenue fund of the village into the water plant revenue fund."

The plan involved the raising of cash with which to pay for the installation free from any lien by way of conditional sale, mortgage, or otherwise.

Plaintiff contends that the village council is without authority to make the improvement to the waterworks unless and until money for the purpose is available in the treasury of the village or unless the installation has been authorized by vote of the electors of the village. It has been assumed upon the argument that, if the village council has the power to issue the warrants, it also has the power to make the improvement. Plaintiff states that the only question involved is that of "the power of the village council to finance this improvement by issuing revenue bonds without an election." A further assumption has been made upon the appeal to the effect that a submission to a vote of the electors of the village is required by statute only where bonds creating a general obligation on the part of the village are to be issued, and that if the warrants in question do not create such an obligation the village council has the power and authority to issue them. It is claimed that, because of the covenants which the warrants contain, they created general village obligations and consequently were in effect bonds rather than revenue warrants.

- 1. A municipality does not incur a general obligation or debt by purchasing property to be paid for wholly out of income or revenue to be derived from the property purchased. Williams v. Village of Kenyon, 187 Minn. 161, 244 N.W. 558. See Hendricks v. City of Minneapolis, 207 Minn. 151, 290 N.W. 428; Davies v. Village of Madelia, 205 Minn. 526, 287 N.W. 1; City of Bemidji v. Ervin, 204 Minn. 90, 282 N.W. 683; Fanning v. University of Minnesota, 183 Minn. 222, 236 N.W. 217. In the Village of Kenyon case, the purchase of equipment for a village electric plant was involved; but no distinction can be made between the purchase of an electric plant and a waterworks, because the authority to acquire both is found in Minn.St.1941, § 457.01, Mason St.1927, § 1229.
- 2. The point is made that the rule that an undertaking by a municipality to pay for property purchased out of income or revenue to be derived from its use applies only where the whole property is purchased and is to be paid for in that manner, and not where the purchase consists of an addition or betterment to

property already owned by the municipality and the revenue or income to be derived from the property already owned and that purchased is to be used in paying for the property purchased. The authorities on this question are in conflict. The weight of authority supports the view that no general obligation or debt is incurred by a municipality by agreeing to pay for an addition or improvement to a utility plant already owned by it out of the income or revenue to be derived from the operation of the plant with the addition or improvement. City of Edwardsville v. Jenkins, 376 Ill. 327, 33 N.E.2d 598, 134 A.L.R. 891; Guthrie v. City of Mesa, 47 Ariz. 336, 56 P.2d 655; Searle v. Haxtun, 84 Colo. 494, 271 P. 629; State and Diver v. City of Miami, 113 Fla. 280, 152 So. 6: Farmers' State Bank v. City of Conrad, 100 Mont. 415, 47 P.2d 853; Underwood v. Fairbanks, Morse & Co., 205 Ind. 316, 185 N.E. 118; 38 Am.Jur., Municipal Corporations, § 474. Such an obligation does not create a lien or charge upon the waterworks system. It pledges income or revenue to be derived from the utility by the municipality in its proprietary capacity. It places the burden for paying for the improvement upon the consumer for whose benefit the utility is maintained rather than upon the taxpayer. It does not deprive the latter of anything that is his, because in theory at least the governmental expenses of the municipality should be paid out of taxes and other municipal revenues and those of a municipally-owned utility out of revenue derived from the operation of the utility. In Williams v. Village of Kenyon, 187 Minn. 161, 244 N.W. 558, supra, we practically adopted the rule stated, because there the issuance of warrants payable out of revenues to be received from a municipally-owned electric plant were pledged to pay for electrical equipment to be installed in a plant, for the payment of which the village had issued general obligation bonds.

3. The covenant to maintain existing rates to cover the payments to become due does not create a general obligation or debt. It is a covenant to perform an act. It is not claimed that existing rates are excessive. Whether an adjustment of rates could be made where it would not prejudice the payment of the warrants is not before us. The rule seems to be well settled that an undertaking to maintain rates sufficient to pay for property purchased, where no general obligation is otherwise created, does not in itself create an indebtedness. City of Bowling Green v. Kirby, 220 Ky. 839, 295 S.W. 1004; Oppenheim v. City of Florence, 229 Ala. 50, 155 So. 859; Interstate Power Co. v. Town of McGregor, 230 Iowa 42, 296 N.W. 770; Seward v. Bowers, 37 N.M. 385, 24 P.2d 253; Annotations, 146 A.L.R. 341; 96 A.L.R. 1390; 72 A.L.R. 692. In numerous cases it has been held that a municipality may contract with a utility company regarding

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rates as an incident of the grant of a franchise. Reed v. City of Anoka, 85 Minn. 294, 88 N.W. 981; Railroad Commission v. Los Angeles Ry. Corp., 280 U.S. 145, 50 S.Ct. 71, 74 L.Ed. 234; St. Cloud Public Service Co. v. City of St. Cloud, 265 U.S. 352, 44 S.Ct. 492, 68 L.Ed. 1050. For the same reason, it may contract regarding rates as an incident to the purchase of a utility or the making of an addition to or improvement thereof.

- 4. Neither does the covenant on the part of the village to pay a fixed hydrant rental upon an annual basis to cover the cost of water furnished to it by the waterworks system create a general obligation or debt. The authorities are practically unanimous in holding that, where a municipality agrees to pay the regularly established rates for water used by it in its fire hydrants, but does not obligate itself to use any water for such purpose, so that its obligation as a consumer of water is only for the amount which it uses and appropriates, no debt is created. Numerous cases hold that, where it obligates itself to pay a certain sum annually, it incurs an obligation to make such payment and that the obligation is a debt. 38 Am.Jur., Municipal Corporations, § 472. An agreement to pay hydrant rental is valid. Reed v. City of Anoka, 85 Minn. 294, 88 N.W. 981, supra. The difficulty in the particular case is to determine whether the municipality has obligated itself to use a particular amount and to pay for it. Here, the covenant did not bind the village to keep any of the hydrants connected with the waterworks system. The number of hydrants is not specified. The village may increase the number of them in use or it may discontinue the use of all of them. Where there is no binding obligation to keep a certain number of hydrants connected, a covenant to pay rental for hydrants connected at a stipulated rate per hydrant creates no debt. Simpson v. City of Highwood, 372 Ill. 212, 23 N.E.2d 62, 124 A.L.R. 1459. Where, as here, the agreement is to pay in periodic installments as the service is rendered, no present indebtedness is created for the amount of the installments to become due. A debt arises at the time the service is rendered. City of Walla Walla v. Walla Walla Water Co., 172 U.S. 1, 19 S.Ct. 77, 43 L.Ed. 341; Annotation, 103 A.L.R. 1160. We applied the rule recently in a case involving periodical payments of rent under a lease. Ambrozich v. City of Eveleth, 200 Minn. 473, 274 N.W. 635, 112 A.L.R. 269.
- 5. The covenant to carry insurance, like the others, is one for the performance of an act and does not create a debt. While the showing with respect to how the insurance premiums are to be paid is not explicit, presumably they are payable out of the income of the waterworks system. A municipality may protect itself against casualty by insurance. City of Red Wing v.

Eichinger, 163 Minn. 54, 203 N.W. 622; 37 Am.Jur., Municipal Corporations, § 124; 38 Id., § 492. Payment for coverage to protect the holders of the warrants is a legitimate expense of selling the warrants and stands upon the same basis as any other expense in that connection. Prudence and foresight would seem to dictate that insurance should be carried with a suitable clause to protect the warrant holders by making available for the payment of the warrants, in the event the anticipated earnings to be derived from the operation of the plant were prevented by its injury or destruction, the proceeds of the insurance to be used either to make the earnings possible by the repair and restoration of the plant or as a substitute for the plant and the earnings dependent upon its future operation.

Our conclusion is that the covenants, with the exception of the one relating to hydrant rental, bound the village to the performance of acts; that the one relating to hydrant rental bound the village only upon the contingency that it kept the hydrants connected with the waterworks system, and then only as it availed itself in the future of the use of the connections; and that none of them created a general obligation or debt. Therefore, it was not necessary to submit the matter of issuing the warrants to the electors for their authorization.

Affirmed.

The extent to which cash and securities in sinking funds may be deducted in computing "net" debt varies. In principle, it would appear that all cash and the value of all securities (whether of the unit or not) in a sinking fund dedicated to the retirement of bonds, which are debts under the applicable limitation, would be deductible. See the leading New York cases of Levy v. McClellan, 196 N.Y. 178, 89 N.E. 569 (1909), and Kronsbein v. City of Rochester, 76 App.Div. 494, 78 N.Y.S. 813 (1902) and the collection of cases in note 125 A.L.R. 1393 (1940). The North Carolina court has rejected the net debt theory in interpreting a constitutional provision forbidding new debt, without electoral approval, in excess of two-thirds of the reduction made in "outstanding indebtedness in the preceding fiscal year." Coe v. Surry County, 226 N.C. 125, 36 S.E.2d 910 (1946); Royal v. Sampson County, 214 N.C. 259, 199 S.E. 15 (1938).

In determining whether bonds about to be marketed would exceed the debt limit, is the computation to be made as of the date when they were authorized by the local governing body (or approved by the voters, if required) or as of the date of delivery to the first holder, that is, actual issuance? There is some authority that the former date governs. By embracing

that view in 1936 the Supreme Court of Pennsylvania was able to clear the way for the issuance of a substantial block of Philadelphia bonds which had been authorized and voted in 1929. As of 1929 they were within the debt limit; as of 1936 they were not. The depression had hit assessed valuations. Duane v. Philadelphia, 322 Pa. 33, 185 A. 401 (1936). With this case compare Missouri Electric Power Co. v. Smith, 348 Mo. 738, 155 S.W.2d 113 (1941).

Debt limitations in Ohio are statutory. The limitations apply simply to funded debt; they expressly embrace the net debt theory; and they specifically ordain that debt shall not be deemed to have been incurred until delivery of bonds or notes. Ohio Gen.Code § 2293-13 (Page, 1937).

In the most elementary legal sense there is patently no debt created by voting bonds. There is neither creditor nor debtor prior to actual issuance. Debt limit policy, moreover, emphasized the tax burden and it is actual flotation which saddles the unit with added debt service taxation. Suppose bonds were voted at a time when, added to existing debt, they would push above the lawful limit, but that at the time of actual issuance a year later they were, by reason of an intervening boost in assessments, within the limit? Does it make any difference here whether electoral action is deemed to be authorization, an enabling step, or simply a condition precedent to the effective exercise of authority by the local governing body?

Refunding bonds may be issued in exchange for the bonds being refunded or may be sold and the proceeds used to retire the old bonds. Statutory authority for both methods has been freely granted. In 1892 the Supreme Court of the United States decided that a sale of refunding bonds created new debt to be added to the old obligations in computing the Iowa local debt limit. District of Doon Township v. Cummins, 142 U.S. 366, 12 S.Ct. 220 (1892). Three judges dissented. It is understandable that the decision has found little favor in the state cases. See collection of cases in Note 97 A.L.R. 442, 448 (1935). There is a possibility of misapplication of proceeds but it is minimized in actual practice by handling the delivery of and payment for the new bonds and the application of proceeds to retire the old all in one closing transaction. The Alabama case which follows carries the matter a long step further.

TAXPAYERS AND CITIZENS OF SHELBY COUNTY v. SHELBY COUNTY

Supreme Court of Alabama, 1944. 246 Ala. 192, 20 So.2d 36.

Gardner, Chief Justice. The County of Shelby had outstanding bonded indebtedness in the amount of \$375,000, bearing interest at the rate of $5\frac{1}{2}\%$ per annum, upon which issue the sum of \$67,000 in the principal amount thereof has been paid and retired, leaving an outstanding bonded indebtedness of \$308,000. These bonds are not callable, and are not due until June, 1953. At the maturity date of these outstanding bonds the county will have funds available to retire as much as \$128,000 principal amount thereof, leaving \$180,000 principal amount, for the payment of which no provision has been made. This proceeding relates to the new bond issue proposed by the county to provide for the \$180,000, and is to bear the lower interest rate of 1 and $\frac{3}{2}\%$ per annum.

Accordingly, the Board of Revenue of Shelby County proceeded to the issuance and sale of these funding bonds, pursuant to statutory authority as found in Sec. 253 et seq., Title 37, Code 1940, and Sec. 104, Title 12, Code 1940. After due advertisement and the correct entry of all orders and resolutions provided by statute in such cases, the Board of Revenue proceeded to sell at public auction to the highest bidder the new issue of \$180,000 bonds, to bear the rate of interest at 1 and 34% per annum. They were accordingly sold at a price equal to 103.37% of par value plus accrued interest—the highest, best, and last bid made therefor. This sale was duly confirmed by proper resolution of the Board. It may be added that the new bonds are callable in whole or in part at par and accrued interest on any interest payment date on or after July 1, 1953.

In the resolution of the Board of Revenue, in proposing the issuance of this \$180,000 refunding bonds, it was expressly provided that the proceeds derived from the sale thereof shall be forthwith invested by the county in the purchase of \$180,000 principal amount of U. S. Treasury bonds, bearing interest at a rate not less than 2% per annum, payable semi-annually, to be of such series, date, and maturity, not earlier than 1952 or later than 1955, as the Board might fix, and thus eliminating any question as to market value fluctuations. It was further provided in such resolution that these U. S. Treasury bonds shall at once be deposited by the county for safekeeping with the First National Bank of Montgomery at Montgomery, Alabama, under an escrow agreement between the county and said Bank, whereunder such Treasury bonds shall be held by said Bank, and the income derived therefrom be remitted by it solely for the payment of interest as the same

shall mature on the new bonds, and the principal proceeds derived from the payment of such Treasury bonds shall be remitted by said Bank solely for the payment of the principal of the old bonds at their maturity, with any excess interest received from the Treasury bonds to be applied toward payment of the principal or interest on the old bonds at the maturity thereof.

Before consummating the plan thus outlined, the Board of Revenue of Shelby County took the precaution to proceed under Article 13, Title 7. Code 1940, for submission by petition to the circuit court for approval of the plan thus outlined. After due notice to the citizens and taxpayers of the county and to the Solicitor and the Deputy Solicitor, as provided in Sec. 171, Title 7, Code 1940, with answer filed and testimony taken, an order was entered validating the new bond issue of \$180,000 and approving the plan as set up in the resolution of the Board of Revenue. It may be added that the proof offered upon the hearing showed beyond question there was no collusion or fraud in any of the proceedings of the Board or in any of the steps taken, and that the Board acted in perfect good faith in authorizing the proposed refunding bonds. It further appeared from the testimony of men experienced in matters of finance that this refunding plan adopted by the Board presented a most favorable opportunity for the refinancing of the indebtedness of the county at a low rate of interest, and that it exhibited excellent business judgment. The court found that the application of the proceeds derived from the sale of the proposed bonds in the manner provided in the resolution of the Board of Revenue would not create a new debt of the county within the meaning of Sec. 224 of the Constitution, and the county's constitutional debt limit will, therefore, not be exceeded. It is to be noted, also, that in the decree the validation and confirmation of the proposed bond issue is rested upon the investment of the proceeds thereof in U.S. bonds, as set forth in the resolution of the Board, and the deposit of said bonds with the Bank, as outlined in the Board's resolution. After a statement of a finding of the facts and the conclusions of law therefrom, the court entered the following decree:

"It is, therefore, upon consideration by the court, ordered, adjudged and decreed by the court as follows:

"(1) The proceedings heretofore had or taken in connection with the authorization and sale by the county of the proposed bonds, and all covenants and agreements on the part of the county (other than the pledge made of said special annual ad valorem tax of one-fourth of one per centum) contained in said resolution of the board adopted on September 19, 1944, are hereby validated and confirmed. When the proposed bonds shall have been executed and sealed in the manner provided in said resolution, and

shall have been delivered to and paid for by the purchaser thereof pursuant to the sale thereof, and not less than \$180,000 of the principal proceeds received therefrom shall have been invested in the United States bonds, and the county shall have entered into the escrow agreement and deposited the United States bonds thereunder, all as is contemplated in said resolution, then the proposed bonds and said escrow agreement will thereupon stand validated and confirmed.

- "(2) Upon the issuance of the proposed bonds in the manner provided in said resolution of the board adopted on September 19, 1944, the president of the board hereby is directed to cause to be stamped, printed or written on the proposed bonds a legend substantially as follows:
- "'Validated and confirmed by decree of the Circuit Court for Shelby County, Alabama, in Equity, rendered on the 28th day of October, 1944.'

"The Register of this court is directed thereupon to sign such legend in her capacity as such register.

"(3) The costs in this cause are hereby taxed against the county.

"Done and Entered at Columbiana, Alabama, this 28th day of October, 1944.

"W. W. Wallace,
"Judge of the Circuit Court,
"In Equity Sitting."

From such order this appeal is prosecuted in pursuance of the express provisions of Sec. 173, Title 7, Code 1940.

All the orders and resolutions of the Board of Revenue of Shelby County appear to be in strict accord with the statutory provisions therefor, and as a consequence this appeal only presents the single question as to whether or not the issuance of these refunding bonds would cause the County to exceed the debt limit, as prescribed by Sec. 224, Constitution 1901. The petition, with the exhibits thereto, disclosed that the constitutional debt limit of Shelby County would be exceeded unless, in computing the indebtedness, the proceeds of the \$180,000 new issue be credited thereon.

Counsel for defendants lay stress upon the cases of District of Doon Township v. Cummins, 142 U.S. 366, 12 S.Ct. 220, 35 L.Ed. 1044, and Murphy v. Spokane, 64 Wash. 681, 117 P. 476, which have been interpreted as holding to the view that a sale of refunding bonds for the purpose of using their proceeds for the retirement of outstanding obligations, as opposed to the direct exchange of such bonds, gives rise to a new indebtedness within the inhibition of a constitutional debt limitation.

We have read these cases with care and much interest, but we find that the holding of these authorities is out of line with the majority view, as expressed by numerous cases throughout the country. These authorities are found set out in the note to State of Florida v. Citrus County, 116 Fla. 676, 157 So. 4, 97 A.L.R. p. 431, beginning on p. 442. Some few of those more directly in point are: Veatch v. Moscow, 18 Idaho 313, 109 P. 722, 21 Ann. Cas. 1332; Banta v. Clarke County, 219 Iowa 1195, 260 N.W. 329; Citrus Growers' Development Ass'n v. Salt River Valley Ass'n, 34 Ariz. 105, 268 P. 773; National Life Ins. Co. v. Mead, 13 S.D. 37, 82 N.W. 78, 48 L.R.A. 785, 79 Am.St.Rep. 876; City of Poughkeepsie v. Quintard, 136 N.Y. 275, 32 N.E. 764; Opinion of Justices, 81 Me. 602, 18 A. 291; Robertson v. Tillman, 39 S.C. 298, 17 S.E. 678; Marden v. Elks Club, 138 Fla. 707, 190 So. 40; City of Los Angeles v. Teed, 112 Cal. 319, 44 P. 580; Powell v. City of Madison, 107 Ind. 106, 8 N.E. 31; Lawrence County v. Jewell, 8 Cir., 100 F. 905; City of Huron v. Second Ward Sav. Bank, 8 Cir., 86 F. 272; Kelly v. Central Hanover Bank & Trust Co., D. C., 11 F.Supp. 497.

And, indeed, our statute authorizes a sale of refunding bonds rather than a mere exchange. See Chapter 6, Title 37, Code 1940.

Our study of the authorities substantiates the view as expressed by the author of the above annotation, wherein it is said: "It will be noted that the weight of authority supports the doctrine that the issuance of bonds for the purpose of funding a valid debt does not create a new indebtedness, although they are sold and their proceeds devoted to the discharge of the outstanding debt, rather than exchanged for the evidences of such debt. . . . There would seem to be no substantial ground for a distinction between a sale and an exchange, where the proceeds of the sale are actually used for the retirement of outstanding obligations."

After all, it is a practical proposition, and the constitutional limitation should be viewed from a common-sense standpoint. In giving effect to Sec. 224 the Court should bear in mind the purpose of its enactment into our organic law. As observed in Town of Camden v. Fairbanks, Morse & Co., 204 Ala. 112, 86 So. 8, like constitutional restrictions are not to be interpreted alone by the words abstractly considered, but by the language used read in the light of the conditions and necessities in which the provisions originated and in view of the purposes sought to be obtained and secured. Restrictions like those contained in Sec. 224 of our Constitution were for the purpose of providing a safeguard against extravagant or unwise expenditure of public funds. Clearly enough, the evil was one of great seriousness, and the debt limit

provision was designed primarily to remedy this evil by establishing safeguards against their recurrence.

As observed in 38 Am. Jur. p. 99: "The clear and unmistakable purpose of such provision is effectually to protect persons residing in municipalities from the abuse of their credit and the consequent oppression of burdensome, if not ruinous, taxation."

We think an examination of the decisions discloses a determined effort on the part of the courts to enforce rigorously such constitutional provisions, and in such a manner as to obtain the stated object. Or, as otherwise stated, and as found in 38 Am.Jur. p. 107: "Attempted evasions of constitutional provisions as to debt limit are viewed with disfavor by the courts."

In considering the question, therefore, here presented care must be taken that no precedent be established which would lead to any method by which such restrictions could be circumvented.

With these general observations we may proceed briefly to consider whether or not the specific plan outlined by the Board of Revenue of Shelby County, and confirmed by the court below, in any manner contravenes the restrictions of Sec. 224 of our Constitution. While the courts must be careful to see that there be a strict observance of this constitutional debt limitation, yet it should be remembered that a limitation of indebtedness is aimed at an actual rather than a theoretical indebtedness. 44 C.J. p. 1123. The court should look to substance rather than mere form. Speaking from a strict technical standpoint, the new bond issue of \$180,000, which cannot presently be applied to the payment of the outstanding bonded debt of \$308,000 because the outstanding bonds are not callable, does create a debt beyond the constitutional limitation as fixed by Sec. 224. But we are persuaded that in substance and effect the outlined plan by which the U.S. bonds are placed with a trustee, the First National Bank of Montgomery, to be applied in the discharge of the old bond issue, should be considered as a credit thereon; and so considered the debt limit of the county is not increased.

The Board of Revenue of Shelby County was confronted with the unfortunate fact that the outstanding bonds were not callable. But the opportunity was presented for a refinancing of the indebtedness of the county at an exceedingly low rate of interest by the issuance of callable bonds, and of course, greatly to the county's advantage. In Re Opinion of the Justices, 244 Ala. 456, 13 So.2d 559, 561, the inquiry propounded to the members of the Court concerned the question of investment of surplus funds from the income tax which were pledged by the constitutional provision to a certain purpose. We recognized that such a fund could not be diverted from the designated source, and that it was in effect a

trust fund. While the response recognized that such funds could only be applied to the stated obligations and purposes declared in the Constitution, yet it was observed that it is not important that the method of doing so shall be by any standard formula if the purpose declared in the Constitution is carried into effect. The conclusion was therefore reached that an investment of these funds in bonds of the United States was safe and a proper investment, and did not violate any provision of the Constitution as to their ultimate use. Speaking of United States bonds, it was further said: "The faith and credit of the United States is the foundation of all money values within its territory. If that is discredited, we have no financial security of any sort."

The Board of Revenue has pursued this course. The money is to be invested in U. S. bonds, uniformly regarded as a perfectly safe and proper investment. These are 2% bonds, and bear interest in excess of the interest rate of the new bond issue of the county. These bonds are held in trust and can be used only for one purpose—the payment of the obligations of the outstanding bonds as they mature. There is no method by which they could be diverted, nor the proposed plan circumvented. They represent the faith and credit of the United States, the foundation of all money values of this country. From a practical standpoint therefore, looking through form to substance, we think these bonds held in escrow by the First National Bank of Montgomery are properly to be considered and deducted from the outstanding obligations to which they are to be applied as they mature. And so considered, the debt limit of the county is not exceeded.

A similar question was presented to the Supreme Court of Arizona in Citrus Growers' Ass'n v. Salt River Valley Ass'n, 34 Ariz. 105, 268 P. 773, 781, wherein the Court observed: "We are of the opinion that on principle the amount deposited in the trust fund as aforesaid should be considered as in effect reducing the indebtedness of the association on the bond issue of 1927 by the amount so deposited, and, if such be true, the bond issue of 1928 and the assessments levied to secure its payment do not violate the terms of the Horse Mesa Trust Indenture."

This principle seems to have been recognized in computing municipal indebtedness, as found in the authorities cited in 44 C.J. p. 1123, and indeed appears to have likewise been given application by this Court in Town of Camden v. Fairbanks, Morse & Co., 204 Ala. 112, 86 So. 8, considered on second appeal in Town of Camden v. Fairbanks, Morse & Co., 206 Ala. 293, 89 So. 456. The case of Doody v. State ex rel. Mobile County, 233 Ala. 287, 171 So. 504, cannot be said to be here directly applicable, for the reason that the Court was there considering the question of debt limitation

viewed in the light of the language of the constitutional amendment passed especially for Mobile County, and the evident purpose thereof.

Upon the question of the time of the issuance of bonds, this Court in Stokes v. City of Montgomery, 203 Ala. 307, 82 So. 663, declared that both the time of the sale and the issuance thereof were matters left to the sound discretion of the city officials, there being no time limit specified for the exercise of the power with which they were vested. It cannot be questioned that the Board of Revenue of Shelby County has exercised sound discretion in providing for the issuance of these new bonds at this time, as disclosed by the facts set forth in this record, and the unusual financial status as to the low rate of interest now prevailing for such securities. And we feel fully justified in reaching the conclusion that the U.S. bonds on deposit for the express purpose of their application to the old bond debt is properly to be considered as a credit thereon at this time.

In substance and effect and from a practical standpoint, so far as Sec. 224 of our Constitution is concerned, it seems clear that such payment may now be considered as made, and the outstanding indebtedness thus reduced so far as the debt limit inhibition of the Constitution is concerned.

Upon consideration of this cause by the Court in consultation, the conclusion was reached that the U. S. bonds purchased and placed in escrow should be earmarked as a trust fund, and to that end should be registered in the name of the Bank as trustee for the county. Accordingly, the decree rendered will be here modified so as to require such registration.

The decree will, therefore, be here modified in the respect indicated, and as thus modified will be affirmed.

Modified and affirmed.

All the Justices concur, except Brown, J., who is of the opinion the debt limit is exceeded, and respectfully dissents.

See also Fuller v. City of Cullman, 248 Ala. 236, 27 So.2d 203 (Ala. 1946).

"Debt" for purposes of computing existing indebtedness has a broader meaning than when used with respect to new liabilities. Thus, a tort claim is not new debt at its inception but once established it is outstanding debt until paid. Likewise, interest becomes outstanding debt if not paid when due. I Dillon, Mun. Corps. § 205 (5th ed. 1911). Dillon would treat accrued, but not unearned, interest as existing debt. It would be impractical to

apply this notion of outstanding debt to a claim which was both disputed and unliquidated. Levy v. McClellan, 196 N.Y. 178, 89 N.E. 569 (1909). Perhaps that would not be true of a claim which was merely unliquidated.

HOLDERMAN v. HIDALGO COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 12

Circuit Court of Appeals of the United States, Fifth Circuit, 1944. 142 F.2d 792.

Hutcheson, Circuit Judge. Brought by plaintiff, claiming to be an innocent purchaser of interim bonds of Hidalgo County Water Control and Improvement District No. 12, this suit involving part of the bond issue dealt with in Laycock v. Hidalgo County Water Control and Improvement District No. 12, et al., 5 Cir., 142 F.2d 789, this day decided, was tried along with Laycock's case and on the same record. While in Laycock's case, coupons attached to some of the bonds had been put in judgment, and the suit was on that judgment to enforce it; in this case, the suit is on the bonds. Fully recognizing that the bonds have been declared to be, and are, invalid and that unless he is entitled to protection as an innocent holder, he cannot prevail, Holderman's whole efforts have been directed to establishing that he was bona fide holder for value, and as such is entitled to protection.

The district judge found that Holderman had no actual notice of the facts which render the bonds void and of the circumstances surrounding their disposal, but that, taking into consideration the recitals in the bonds and the other facts which he knew, he was put on inquiry, which inquiry if pursued would have led to notice of all the facts. He found also: that the bonds and the resolution authorizing them showed on their face that they were issued not under the statute in force at the time they were voted but under the amended statute and without a vote; and that, the Texas courts having held that their issuance under the amended statute without a vote made them illegal and void on their face, Holderman was in law charged with notice of this invalidity and could not recover.

Here appellant recognizes that, since more bonds were issued than were authorized under the statute in force when the vote was taken, \$550,000 authorized and \$650,000 issued, no bond can be enforced for its full amount. He insists though that, under Citizens' Bank v. Terrell, 78 Tex. 450, 14 S.W. 1003, City of Laredo v. Looney, 108 Tex. 119, 185 S.W. 556, and Rockwall County v. Roberts County, 103 Tex. 406, 128 S.W. 369, the issued bonds must be considered valid in the amount authorized by the stat-

ute and invalid only as to the excess, each bond to be scaled proportionately, and that plaintiff should have had a judgment on his bonds not for their face, but for 55/65ths thereof. He particularly insists that the court erred in finding him not an innocent purchaser for value without knowledge of the fraud which had attended the issuance and floating of the bonds.

Appellees, urging that the district judge was right throughout, insist that, since the Texas courts have held that the issuance of the bonds, under the amended statute, without a vote, renders them void and that they show on their face that they were so issued, there can be no question here of innocent purchase or of scaling.

We agree with appellees. The law is settled that while an innocent purchaser of bonds holds them free of the consequences of defects not apparent on the face of the record, he takes them with all their disclosed imperfections on their head, and if it is determined as matter of law that the bonds are invalid on their face, he cannot shelter behind his own lack of knowledge of the law, or legal opinions to the contrary. The rule of scaling invoked by appellant has no application here. That principle applies to bonds whose only defect is that in issuing them debt limits have been exceeded. It operates to cure that defect by scaling the bonds back to the allowed amount. The defect asserted here is not that the debt limit has been exceeded, but that bonds, legal and valid only if authorized by vote, were issued without a vote. It is quite clear that the courts of Texas have held: (1) That the bonds were issued under the amended statute; (2) that to be valid under that statute they must have been voted since its enactment; and (3) that, not having been so voted, they are void and no person can take valid title to, or recover on, them.

The Supreme Court, in State ex rel. Abney v. Miller, 133 Tex. 498, 128 S.W.2d 1134, 1137, flatly held that interim bonds of the issue under attack here were not "authorized by the voters" and that, because they were not, they were not valid. The court said:

"We do not hold that Article 7880—84a, as amended, authorizing the issuance of ten year interim bonds . . . is unconstitutional . . . What we hold is that the amendment may not be given retroactive effect, but is applicable only to bonds voted after its effective date. The validity of interim bonds, as of all other bonds, must be tested by the law as it existed when their issuance was authorized."

In Miller v. State, 155 S.W.2d 1012, the Court of Civil Appeals rejected the same contention urged here, that the bonds were

invalid only to the extent of their excess over the amount authorized by the statute in force when they were voted and that the defect could be cured by scaling. It said at page 1018 of 155 S.W.2d, "For the reasons before indicated," we do not think the interim bonds as issued ever had any potential validity, either in whole or in part, for any purpose whatsoever." The judgment was right. It is affirmed.

SIBLEY, CIRCUIT JUDGE (concurring). I concur in the judgment but see the case as follows:

The electorate of the district, as provided by the Texas Constitution, authorized a bond issue. The statute then existing authorized the issuance of ten per cent thereof as ad interim bonds, on the security of the main bonds, not increasing at all the amount of indebtedness. After the election and before the issuance of any ad interim bonds the statute was amended so that twenty-five per cent of ad interim bonds might be issued. The officers of the district, thinking the amendment applied retroactively to their election and bonds, passed a resolution to issue twenty-five per cent. Only \$650,000 were actually negotiated so as to become outstanding, being a little less than twelve per cent. About two per cent thus were outstanding in excess of the ten per cent contemplated by the election.

The amending statute expressly repealed all conflicting laws, but this did not repeal the former ten per cent statutory authorization, but enlarged and carried it forward. There was no conflict. Either under the new, or under the former law, ten per cent of ad interim bonds could still have been issued. But since the election had authorized only ten per cent, no more could be issued for lack, as to the excess, of authority from the electorate. The result is that there was no lack of statutory authority, but as to two per cent there was excess of constitutional authority from the electorate.

The consequence, as settled in Texas by Citizens' Bank v. Terrell, 78 Tex. 450, 14 S.W. 1003, and cases following it, is that only the indebtedness in excess of the authority is void, and when all bonds are delivered at once as here, each must be scaled down pro tanto. That, I think, is clearly the case here. A Texas Court

^{*&}quot;Since the interim bonds in controversy were issued under the provisions of Article 7880—84a of Vernon's Ann.Civ.Stat., as amended, * * * which amendment became effective on April 9, 1930, without such proposition having been first submitted to the voters of the District for their adoption, we hold that said bonds are invalid and void because issued in violation of the plain provisions of the Constitution. * * * Such, as we understand, is the clearly expressed holding of the Supreme Court in its opinion on the former appeal of this cause." 155 S.W.2d at page 1017.

of Civil Appeals in Miller v. State, 155 S.W.2d 1012, expressed the opinion that these bonds are wholly void, but said also that they should not be scaled because the parties before the court were holders in bad faith, being persons who had participated in a fraudulent obtaining of the bonds from the district without payment of value for them. We should go no further in applying this case as authority against the previously settled law that bonds are to be scaled when authority is exceeded.

The appellant here, admitting his bonds must be scaled, seeks protection against the defense of want of consideration and fraudulent title in the first holder by asserting that he is a bona fide holder in due course before maturity. This involves no equitable principle, and no equitable doctrine of notice implied by being put on enquiry. The matter is regulated by the law merchant, embodied in the Negotiable Instruments Act. Vernon's Ann.Civ.St. of Texas, Art. 5932 and following. Article 5935 defines a holder in due course, and in § 52, Paragraph 4 states as one necessary requirement: "That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." The evidence here shows that appellant had no notice of the want of consideration or of the fraud in the title of the previous holder but he did know of the facts which made the bonds subject to be scaled. That was an infirmity in the bonds, and notice of it prevented his being a holder in due course and subjected him to all defenses that existed against the bonds. He loses for this reason only.

(4) State Administrative Approval

The late depression made the states more sensitive to problems of local finance and led to provision for more state administrative control of local borrowing as well as other fiscal matters. In North Carolina the Local Government Commission, a wellstaffed, competent agency, has authority to consider thoroughly the factors bearing on the question whether bonds should be issued, but its disapproval may be overridden by action of the local electorate. N.C.Gen.Stats. § 159-7 through 159-11 (1943). The Louisiana State Bond and Tax Board is composed of ex officio members without provision for an effective permanent staff, yet it has a real veto on local issues. La.Stats. §§ 8911.1-8911.12 (Dart. Supp.1944). In 1943 Michigan established a municipal finance commission whose approval must be obtained before a municipality may issue bonds. Mich.Stats.Ann. § 5.3188(3) et seq. (Callaghan, Supp.1947). For more adequate discussion of the subject see Wylie Kilpatrick, State Supervision of Local

Finance, 31 et seq. (Pub.Admin.Serv. No. 79, 1941), and L. A. Shattuck, Jr., Municipal Indebtedness, A Study of the Debt-to-Property Ratio, 58 Johns Hopkins University Studies in Historical and Political Science No. 2, c. IX (1940).

(5) Sale

Unless otherwise provided by statute, municipal bonds may be offered at either public or private sale. But see Eagle v. City of Corbin, 275 Ky. 808, 122 S.W.2d 798 (1938), set out at the beginning of Chapter 2, (public sale required by judicial decision). The prevailing method under contemporary legislation is public sale on the basis of competitive, sealed bids. Sale at public auction is not common. It is advantageous to receive bids on interest rates since it makes effective use of fractional rates and causes the competition to be reflected directly in the interest rate or rates rather than in the premium bid. This method is illustrated in the transcript.

In West Virginia the State Sinking Fund Commission, which nursed the local units through the depression without a single default, is charged with the administration of all interest and sinking funds of local units. W.Va. Code § 1096 et seq. (Michie, 1943). All new issues must be offered to the Commission at par and accrued interest before being advertised for public sale. 1102. If a new issue of general obligation bonds would bring a premium, the effect of giving a state agency an option to buy at par and accrued interest is to enable it to impose a heavier net interest cost upon the unit for the agency's benefit. Many state constitutions expressly require uniformity of ad valorem taxation. Since the scheme just outlined would impose an uneven burden, for a state purpose, upon taxpayers within the confines of the borrowing unit, it has been held in Ohio that it violates the uniformity requirement. State ex. rel. City of Cleveland Heights v. Frazine, 110 Ohio St. 523, 144 N.E. 289 (1924).

If public sale is required bonds may not be exchanged for the property the acquisition of which is the object of the financing. See Hunt v. Fenlon, 313 Mich. 644, 21 N.W.2d 906 (1946).

The student will have observed from the transcript that North Carolina local issues are sold by the Local Government Commission. This is particularly helpful to small units not in a position to fend effectively for themselves.

Ordinarily the original purchase of an issue of municipals will be made by one or more bond dealers. There are likely to be a number of firms in the buying group if the issue is a very large one. The transaction is a genuine immediate purchase (or lending, if you will) and not an underwriting. It is the object of the dealers to turn the securities over at a profit by sale to institutional and other investors. The dealers are not, however, invariably in the picture. A small issue may be taken by a local financial institution or other investor. In some instances large issues have been purchased directly by major financial institutions. Thus it is reported that the Port of New York Authority has recently sold \$30,000,000 of Airport Terminal Bonds directly to three insurance companies. II Am.Mun.News No. 10, p. 76 (June 1948).

Local officials need to keep informed of the classes of investors in municipals and of legal limitations upon their powers of investment. Individual and corporate investors enjoy income tax exemption with respect to the income from municipals which, as we have observed in Chapter Two, is reflected in interest rates. The exemption is of particular significance to individuals and corporations with large amounts to invest. Legal limitations come into play with respect to investment of public funds, fiduciary funds and the funds of financial institutions such as banks and insurance companies. One is likely to find that in a given jurisdiction only general obligation bonds of local units of other states are constituted "legals" for trust funds. See, for example, 20 Pa.Stats. § 801 (Purdon, Supp.1947) and Rule 23 of the Local Civil Rules of the District Court of the United States for the District of Columbia.

A national banking association may not hold for its own account at any one time investment securities of any one obligor in an amount exceeding ten per centum of the bank's unimpaired surplus and paid-in capital. An exception is made as to general obligation municipals but not as to revenue bonds. 12 U.S.C.A. § 24 (1945).

In some of the important investor states only the obligations of certain types of local units may appear at all on the legal list for institutional investors. In New York, savings banks may invest in obligations of local units of other states only if the borrowing units have power to levy unlimited taxes on the taxable real property therein for debt service on the obligations. New York Banking Law, § 235-5. This automatically eliminates non-New York revenue bonds. There are other limitations under that act relative to the age, population, total indebtedness and bond payment record of the borrower, which many units, particularly the smaller ones, may not be able to meet.

CITY OF EL CAMPO v. SOUTH TEXAS NATIONAL BANK OF SAN ANTONIO

Court of Civil Appeals of Texas, 1946. 200 S.W.2d 252. Writ of Error denied by Supreme Court, Feb. 5, 1947.

Norvell, Justice. The South Texas National Bank issued and delivered to Russ and Company its cashier's check for \$5,340, payable to the City of El Campo, Texas. Subsequently, both parties claimed the proceeds of the check. Russ and Company demanded that the check be returned to it, and the City demanded payment of the check. The bank tendered into court the amount of money represented by the check and impleaded the City of El Campo and Russ and Company and its associate, Columbian Securities Corporation of Texas.

This case involves the construction of a written contract entered into between the City of El Campo as one party and Russ and Company and Columbian Securities Corporation as the other party. The agreement related to the purchase of certain Waterworks Revenue Bonds of the City of El Campo. The controlling question at issue upon this appeal is the construction of the words "unqualified approving opinion of Messrs. Chapman and Cutler" (bond market attorneys) as used in the contract.

Judgment below was against the City, which has appealed. We shall designate Russ and Company and its associate, Columbian Securities Corporation of Texas, as appellees. When necessary, we shall refer to the bank by name.

The pertinent parts of the contract involved are as follows: "June 25, 1945

"Hon. J. S. Carroll, Mayor and City Commissioners
"El Campo, Texas

"Gentlemen:

"We understand that the City of El Campo contemplates the issuance of Waterworks Revenue Bonds in an amount not to exceed \$250,000.00 for the purpose of acquiring the Waterworks System presently owned by the Central Power & Light Company and for the improvement, betterment, and extension of said system. We further understand that such bonds will be secured by and payable from the net revenues derived from the operation of the Waterworks System (and all extensions and improvement thereto) after providing for the expense of operation and maintenance. In this connection, we make you the following proposal:

"1. We hereby agree to purchase and you by your acceptance of this proposal hereby agree to sell to us at par and acceptance interest from their date of date of delivery to us, your legally issued City of El Campo Waterworks System Revenue

Bonds in an amount not to exceed \$250,000. It is understood and agreed that you may deliver to us a lesser amount than \$250,000 except that in any event the amount of bonds delivered to us under the terms of this contract shall be all of that portion of the \$250,000 which will be required to purchase the existing System from C. P. & L. In such event that said City is not successful in acquiring said system this contract shall be null and void (after Nov. 15, 1945). . . .

"(Paragraphs 2, 3 and 4 relate to maturities and interest rates of the proposed bond issue.)

"5. We further agree that we will pay all costs in connection with the preparation of the bond proceedings by attorneys mutually agreeable, printing of the bonds, and all other usual costs incident to the issuance of said bonds including the cost of the unqualified approving opinion of Messrs. Chapman & Cutler, Chicago, Illinois. It is also understood and agreed that the City Council of the City of El Campo will pass all such orders as are usual and necessary to expedite the issuance and delivery of these bonds to us.

"Purchase of these bonds by us is subject to the approval of same as to legality by the Attorney General of the State of Texas and Messrs. Chapman & Cutler, Chicago, Illinois.

"If this proposal is accepted by you and as evidence of our good faith, we agree to promptly deposit with you a Cashier's Check payable to the City of El Campo in the amount of \$5,340.00 which is to be held by you uncashed pending delivery of these bonds to us at which time it shall be returned to us. Said check may be cashed by you and the proceeds retained as full and complete liquidated damages only in the event we fail or refuse to take up and pay for these bonds in accordance with the terms of this proposal. Our commitment to purchase these bonds shall extend until Nov. 15, 1945, and in the event said bonds are not delivered to us accompanied by the unqualified approving opinion of Messrs. Chapman & Cutler by that date then said Cashier's Check is to be returned to us and delivery of the bonds may be made to us thereafter only at our option.

"Respectfully submitted,

"Columbian Securities Corporation of Texas and

"Russ and Company
"By Cecil J. Cox
"Authorized Representative
"By R. J. Thomasma

"The above proposal is hereby accepted by order of the City Council of the City of El Campo and the bonds are hereby awarded to the Columbian Securities Corporation of Texas, and Russ and Company, both of San Antonio, Texas.

"J. S. Carroll

"Mayor, City of El Campo, Texas.

"Attest:

"Ruth Bourn

"City Secretary, City of El Campo, Texas.

"(Seal)"

(Italics ours.)

On November 15, 1945, the representatives of the contracting parties and the Central Power and Light Company met at the Frost National Bank in San Antonio, Texas, for the purpose of closing the deal. The parties had in their possession the following communication from Chapman and Cutler:

"Law Offices of "Chapman and Cutler" "111 West Monroe Street "Chicago 3

"November 13, 1945

"Russ & Company
"South Texas Bank Building
"San Antonio 5, Texas

"Gentlemen:

"We understand that \$205,000 Water System Revenue Bonds of the City of El Campo, Texas, are to be delivered to you and paid for in San Antonio on Thursday and that as a part of the transaction Central Power and Light Company is going to convey the El Campo water system to the city. We have been asked to have our final opinion escrowed in San Antonio ready for release on Thursday.

"Because of the shortness of the time remaining we are writing directly to you. You will recall how the Fort Stockton Gas Revenue Bond delivery was handled. This El Campo transaction is of similar nature and for the reason which made it impossible for us to escrow a final opinion there, we cannot do so here.

"We have examined all of the showings submitted to date and have found them satisfactory. We are now prepared to approve the bonds upon submission of the following:

- "1. A title opinion in the enclosed form dated as of the date of delivery of the bonds. We are today sending two additional copies of the form by air mail to Judge Jessup.
- "2. A treasurer's receipt in the form which has heretofore been sent to us and which is satisfactory.
- "3. A certificate dated as of the date of delivery evidencing the absence of any pending litigation affecting the city, the bonds or the water system, and evidencing the absence as of that date of

any pledges of the water revenues other than to the payment of the issue of \$250,000, of which these bonds are a part.

"4. After its delivery, the executed deed, on which is to appear the Recorder's endorsement evidencing proper recording of the deed in Wharton County.

"Mr. Everett L. Looney wired the Texas office of the company yesterday to send us by air mail a copy of the proposed form of deed and a plat on which we can check the real estate descriptions. These documents have not reached us today but should be here tomorrow. As soon as we have examined them, we will wire you whether they are satisfactory.

"After you have received our wire as to the sufficiency of the deed, we hope that you will feel in position to take up and pay for the bonds when the other documents listed above are made available in executed form on Thursday. A little delay in the issuance of our final opinion may occur because of the necessity of having the deed recorded, but in a small county such as Wharton, it should be possible to arrange with the Recorder to record the deed immediately after it is delivered to him so that it can be returned for submission to us in a matter of hours.

"Our opinion approving these bonds will refer to the title opinion somewhat as did our opinion on the Fort Stockton bonds.

"Yours very truly,
"Chapman and Cutler"

Appellees refused to accept the bonds tendered to them by the City on November 15, 1945, for the sole and only reason that said bonds were not "accompanied by the unqualified approving opinion of Messrs. Chapman & Cutler." It appears that the City was in a position to meet all of the requirements outlined in the letter of Messrs. Chapman and Cutler, dated November 13, 1945, at the time and place set for the closing of the deal with the exception of the recording of the deed in Wharton County, provided appellees paid for the bonds so that the treasurer's receipt could be handed over, the deed secured from the Central Power and Light Company, and a title opinion covering the transaction dated and delivered. The City had in its possession the required nonlitigation certificate.

Appellant made a good faith effort to close the deal and, as we understand appellees' position, they do not contend that the City was remiss in these particulars, but based their refusal to accept bonds upon the inability of the City to deliver the type of legal opinion which they contend was called for by the contract.

The record discloses that the bonds, which were the subject matter of the contract of June 25, 1945, were, after November 15, 1945, sold to other parties and an opinion of Messrs. Chapman

and Cutler was obtained in connection with this sale. This opinion is here set out as it is undoubtedly the type of opinion referred to in the letter of Chapman and Cutler dated November 13, 1945, as a "final opinion":

"Chapman and Cutler"
"111 West Monroe Street
"Chicago 3

"December 7, 1945

"We hereby certify that we have examined certified copy of the proceedings of the City Council of the City of El Campo, Wharton County, Texas, passed preliminary to the issue by said city of its Water System Revenue Bonds to the amount of \$205,000 (being part of a total authorized issue of \$250,000), dated November 1, 1945, denomination \$1,000, numbered 1 to 205, inclusive, due serially on November 1 of each of the years 1947 to 1962, inclusive (here follows detailed description of bonds), and we are of the opinion that such proceedings show lawful authority for the issuance of said bonds under the laws of the State of Texas now in force.

"We further certify that we have examined executed bond number one and find the same in due form of law and in our opinion said bonds are valid and legally binding special obligations of the City of El Campo and, together with the remaining bonds of the authorized issue when delivered, are payable from and secured by pledge of the revenues of the water system of said city remaining after there have been first paid therefrom the reasonable cost of operating and maintaining the system. As to matters pertaining to the title of the city to said system and as to the regularity of the corporate proceedings had in the authorization and conveyance of the system to the city, we have examined an opinion of title written November 30, 1945, by Donald M. Duson, an attorney of El Campo, Texas, and as to such matters this opinion is written in reliance thereon.

"Chapman and Cutler"

Appellees take the position, and evidently the trial court agreed with them, that the phrase "unqualified approving opinion of Messrs. Chapman and Cutler" means a final market opinion in substantially the same form as that above set out.

If this construction be adopted, then it follows that the contract of June 25, 1945, is a mere nudum pactum, unenforcible at the instance of either party thereto, by reason of the presence in the contract of a condition precedent which is impossible of performance. 12 Am.Jur. 610, § 115.

The municipal bonds here involved are Texas revenue bonds. Statutory authority for the issuance of this type of security is found in Articles 1111-1118, Vernon's Ann.Civ.Stats. The dis-

tinguishing feature of revenue bonds issued in accordance with the articles cited is that the holders of such bonds have no claim upon funds raised or to be raised by taxation in order to secure payment of their obligations. Articles 1111 and 1114. Whenever the income of a water system is encumbered in connection with the issuance of bonds for a permissible statutory purpose, such bonds are a charge against the revenues of the water system subject to the reasonable expenses of maintenance and operation of the system. Article 1113.

One essential prerequisite to the practical validity or enforcibility of revenue bonds secured by an encumbrance of the revenue of a "system" is the ownership of a "system" by the municipal authority issuing the bonds.

The parties to the contract of July 25, 1945, contemplated that the City would "acquire" a Waterworks System. This system could not be acquired free and clear of all liens or claims of the vendor until it had been paid for. A final market opinion relating to the type of bonds here involved could not be rendered until after the City had actually bought and paid for, and thus acquired a Waterworks System. A contract which contemplates that the proceeds of a revenue bond issue shall be used to acquire a "system," and then provides that the purchase price for the bonds shall not be paid until after the Waterworks System has been acquired is obviously a contract incapable of being enforced.

Appellees contend that the delivery of an "unqualified approving opinion" was a condition precedent, but contend that it was possible of performance. Upon this point appellees argue:

"This could have been accomplished by the city going to the Frost Bank about ten days prior to November 15, 1945, along with Russ and the C. P. & L. representative. The city could have deposited the bonds in escrow. Russ could have deposited the purchase money in escrow and the C. P. & L. could deliver the deed with the understanding that the escrow agent would hold the money and the bonds until the deed was properly recorded and the unqualified approving opinion of Chapman & Cutler obtained. Of course the city in addition to the recorded deed, would have had to also furnish Chapman & Cutler with the other items reguested by Chapman & Cutler in their letter of November 13th which they had to have before they could approve the bonds. Upon the delivery of the approving opinion to the escrow bank. the bank would deliver the bonds to Russ, purchase money to the C. P. & L. and the city would have its waterworks system. In the event no approving opinion could be obtained the bonds would be returned to the city, purchase money to Russ, and at the time of the original deposit the city could have also deposited a deed reconveying the water works system to the C. P. & L. in the event

of such inability to procure a final unqualified opinion of Chapman & Cutler."

Appellees' argument is that appellant and appellees, together with the Central Power and Light Company, could have made a further agreement which could have been carried out in accordance with the escrow plan suggested in appellees' brief. This is beside the point. In determining whether or not a particular construction of a contract would result in a conclusion that the contract was invalid because based upon a condition precedent impossible of performance, the all important consideration is the terms and provisions of the contract actually written by the parties, and not some hypothetical agreement which possibly could have been but actually was not made by the parties.

Under well-recognized principles of law, the construction of the contract urged by appellees must be rejected if there be some reasonable construction of the contract which would render it valid and enforcible. "It is not to be presumed that the parties intended that an impossible thing should be done," or "that the parties deliberately entered into an agreement calling for an impossible condition or event as a test of performance." 17 C.J.S. Contracts § 318, note page 739. "A construction which renders performance of the contract possible will be adopted, rather than one which renders its performance impossible or meaningless, unless the latter construction is absolutely necessary; and it has been held that no matter how clear the ordinary significance of the words, they must not be given a meaning which, when applied to the subject matter of the contract, will render performance impossible." 17 C.J.S., Contracts, § 318, page 738. also Magnolia Petroleum Co. v. Stroud, Tex.Civ.App., 3 S.W.2d 462, 465; Saunders v. Clark, 29 Cal. 299, 300, 306; Danley v. Merced Irrigation Dist., 76 Cal.App. 52, 243 P. 676, 678; 12 Am. Jur. 793, § 251.

Generally, a legal opinion either expressly or impliedly relates to a certain date or time. As above pointed out, a "final market opinion" relating to revenue bonds can not be obtained until *after* the bonds have been sold and delivered to a purchaser and the consideration therefor paid to the issuing authority. On the other hand, the Attorney General's opinion, also called for by the contract, must be rendered *before* the bonds are offered for sale. Articles 709, 4398, Vernon's Ann.Civ.Stats.

Because the opinion of the Attorney General is issued before the sale of bonds and a market attorney's final opinion is issued after such sale, it could hardly be said that one is a qualified approving opinion and the other is an unqualified approving opinion. Both are unqualified approving opinions as of their respective dates. The final market opinion simply covers an additional transaction, the first negotiation of the bonds, which is not covered by the Attorney General's opinion. An opinion might be prepared relating to the validity and marketability of bonds ten years after their first negotiation. Such an opinion would probably cover numerous transactions occurring after the first negotiation, but the fact that such opinions may be and are occasionally written does not prevent opinions as to the legality of the bonds written prior thereto from being properly regarded as "unqualified approving opinions." Time or date is not necessarily the distinguishing characteristic of an "unqualified approving opinion."

We conclude, assuming as we must that the parties intended to make an enforcible contract, that the time to which the approving opinion called for in the contract relates necessarily precedes the time when the consideration is to be paid for the bonds in accordance with the contract. In other words, the opinion which the parties contracted for was not an opinion covering the transaction wherein the consideration for the bonds was to be paid, and the transactions which would follow in natural sequence therefrom.

This brings us to a consideration of the Chapman and Cutler letter of November 13, 1945. While this letter contains some additional details, it is in substance a preliminary market opinion in that it states that all proceedings to date of opinion are in legal form, contains closing instructions and a definite commitment to issue a final market opinion when the closing instructions have been carried out.

It is stated in the letter that, "We have examined all of the showings submitted to date and have found them satisfactory." The record of proceedings had with reference to the bonds up until November 13, 1945, was thereby approved.

The matters set forth in the numbered paragraphs of the letter are in no sense qualifications of the expressed approval of all proceedings had prior to November 13, 1945. On the contrary, they are in the nature of closing instructions—stated requirements as to matters which in the contemplation of the writers would take place after receipt of the letter. The things required to be done were all dependent upon the payment of the consideration which appellee agreed to pay the City for its bonds.

We hold that, under the contract construed in accordance with the rules above set out, the requirement that the bonds be delivered to appellees, "accompanied by the unqualified approving opinion of Messrs. Chapman & Cutler" was met by the delivery of that firm's opinion dated November 13, 1945. The proceedings had with reference to the bond issue prior to that time were approved. The parties in effect were notified that the deal was ready to close. All requirements contained in the preliminary opinion upon which the commitment for a final opinion was based, relate to actions or undertakings which would necessarily take place after the payment of the agreed consideration for the bonds. A preliminary opinion is obviously written for deal closing purposes, and we believe it a reasonable construction of the contract, to conclude that it was this kind of an opinion that the parties contemplated when they entered into the contract of July 25, 1945.

We further hold that when appellees, on November 15, 1945, refused to pay the agreed purchase price for the bonds involved, they breached the contract and are liable for the liquidated damages stipulated therein.

The judgment of the trial court is reversed, and judgment here rendered that the City of El Campo do have and recover as against Russ and Company and Columbian Securities Corporation of Texas, the sum of \$5,340, being the amount of the fund deposited with the clerk of the court below, and said clerk is further ordered to forthwith pay said sum over to said City of El Campo. It is further ordered that the City of El Campo have judgment against Russ and Company and Columbian Securities Corporation of Texas for interest on \$5,340 at the rate of six per cent per annum from November 16, 1945, until paid, together with all costs of suit in this Court and the court below, including the amount of \$200 allowed to South Texas National Bank of San Antonio as and for attorney's fees.

Reversed and Rendered.

B. INVESTORS' SAFEGUARDS

(1) Pre-issue Administrative or Judicial Review-Validation

In Texas and several of the midwestern states it is required that municipal bonds be registered by a state fiscal officer. The purpose may be simply authentication and record or to enable the state officer to alert local officers about current debt service requirements, it may be review of regularity looking to appropriate certification on a satisfactory record of proceedings, or all of these things. The Missouri statute embraces all three objectives. The state auditor endorses his certification on each bond if he finds that all conditions of law have been complied with in its issue. Mo.Rev.Stat.Ann. § 3306 (1939). It is provided that bonds certified by the auditor shall be open only to the defenses of fraud or forgery except that any bonds issued

in excess of the constitutional debt limit shall be void to the extent of the excess.

Several states, among which are Texas, West Virginia and Wisconsin, require that municipal bond proceedings be reviewed as to legality by the attorney general prior to issuance. In Texas the certification of the attorney general is given the same effect by statute as that of the state auditor by Missouri law. Vernon's Tex.Stats. Art. 715 (1936). The West Virginia and Wisconsin plan is quite different. Those states allow a brief period after action by the attorney general during which it is subject to attack in the courts. In West Virginia notice of the attorney general's action is published locally and the limitation period runs from date of last publication. Any person in interest or taxpayer of the unit may, within the period allowed, obtain review in the Supreme Court of Appeals of the action of the attorney general. See W.Va.Code of 1943, § 1077 et seq. (Michie); Sessler v. Partlow, 126 W.Va, 232, 27 S.E.2d 829 (1943). If approved by the attorney general and review is not had in the time allowed the bonds become "incontestible". See also Village of Gilman v. Northern States Power Co., 242 Wis, 130, 7 N.W.2d 606 (1943).

In several southern states municipal bonds must or may be run through a type of declaratory judgment proceeding, commonly termed a validation proceeding, prior to issuance. The procedure is mandatory in Florida, Kentucky, Mississippi and perhaps other states. The device has been known to the law of California and other western states in the financing of public improvements, such as irrigation works, by special districts. References to statutes will be found in Borchard, Declaratory Judgments, 145 et seq. (2d ed. 1941). Professor Borchard finds merit in the procedure (p. 381). Certainly it serves to quiet, in advance of issue, legal questions which otherwise might cause innocent holders to go empty-handed. He fails, however, to note the uncontested rubberstamp character of the typical validation proceeding.

Validation decrees, entered in uncontested proceedings, silence even constitutional questions in some jurisdictions. In the leading Florida case of Weinberger v. Board of Public Instruction, 93 Fla. 470, 112 So. 253 (1927), it was apparent on the face of the bond proceedings that the bonds in suit did not mature in annual installments as required by the constitution. There was no contest and the point was not passed upon. The court could not bring itself to swallow the white-washing of that sort of defect. A later case evinces a disposition on the part of the court to confine the effect of the Weinberger case, as an authority, strictly to situations where the constitutional defect appears on

the face of the validation record. State ex rel. Fidelity Life Ass'n v. City of Cedar Keys, 122 Fla. 454, 165 So. 672 (1936).

CASTEVENS v. STANLY COUNTY

Supreme Court of North Carolina, 1937. 211 N.C. 642, 191 S.E. 739.

[Taxpayer's action to enjoin the issuance of \$41,500 School Funding Bonds and \$18,500 General Funding Bonds of Stanly County on the ground that, while the bond orders provided for the levy of unlimited taxes for the payment of the bonds, the debts to be funded had not been incurred for special purposes and thus were within the provision of Section 6 of Article V of the state constitution which limits county ad valorem taxes for ordinary purposes to 15 cents on the hundred dollars of taxable value. The action was, in effect, a collateral attack upon a decree which, a short time before, had been entered in a proceeding brought by the county under the statute set out in the opinion which follows. That proceeding was against all the owners of taxable property and all the citizens residing in the county and against one Auten, a taxpayer, who was sued in a representative capacity. He was served personally, all others by publication. Neither he nor anyone else contested the proceeding. A decree determining that the bonds and the tax provided for their payment were valid was entered in the "validation" proceeding. Plaintiff here contended that the prior proceeding did not involve a justiciable controversy and that he was not within the jurisdiction of the court because not personally served. To give the decree binding effect would, he contended, deny him due process. The court below considered the validation decree res adjudicata and gave judgment for the county.

CONNOR, JUSTICE. Chapter 186, Public Laws of North Carolina 1931, is entitled "An Act to provide the manner in which the issuance of bonds or notes of a unit and the indebtedness of a unit may be validated."

In section 1 of said act (Code 1935, § 2492(52), the word "unit," as used therein, is defined as "a county, city, town, township, school district, school taxing district, or other district or political subdivision of government of the State."

Sections 4 to 8, inclusive, of said act, as amended by chapter 290, Public Laws of North Carolina 1935 (see N.C.Code 1935, §§ 2492(55) to 2492(59), inclusive) now read as follows:

"Sec. 4. At any time after the adoption of an ordinance, resolution, or order for the issuance of refunding or funding bonds of a unit by the board authorized by law to issue the same, and

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following the approval of the issuance of such bonds by the local government commission, and prior to the issuance of any such bonds, such board may cause to be instituted in the name of the unit an action in the superior court of any county in which all or any part of the unit lies, to determine the validity of such bonds and the validity of the means of payment provided therefor.

"Such action shall be in the nature of a proceeding in rem, and shall be against each and all the owners of taxable property within the unit and each and all the citizens residing in the unit, but without any requirement that the name of any such owner or citizen be stated in the complaint or in the summons.

"Jurisdiction of all parties defendant may be had by publication of a summons once a week for three successive weeks in some newspaper of general circulation published in each county in which any part of the unit lies, and jurisdiction shall be complete within twenty days after the full publication of such summons in the manner herein provided. Any interested person may become a party to such action, and the defendants and all others interested may at any time before the expiration of such twenty days appear and by proper proceedings contest the validity of the indebtedness to be refunded or funded or the validity of such refunding or funding bonds or the validity of the means of payment provided therefor.

"The complaint shall set forth briefly by allegations, references, or exhibits the proceedings taken by such board in relation to such bonds and the means of payment provided therefor, and, if an election was held to authorize such issuance, a statement of that fact, together with a copy of the election notice and of the official canvass of votes and declaration of the result. There shall similarly be set forth in the complaint a statement of the amount, purpose, and character of the indebtedness to be refunded or funded, and such other allegations as may be relevant. The prayer of the complaint shall be that the court find and determine as against the defendants the validity of such bonds and the validity of the means of payment so provided.

"Sec. 5. The trial of such action shall be in accordance with the Constitution and laws of the State; and the rules of pleading and practice provided by the Consolidated Statutes and court rules for civil actions, including the procedure for appeals, which are not inconsistent with the provisions of this act, are hereby declared applicable to all actions herein provided for; Provided, however, that an appeal from a decree in such action must be taken within thirty days from the date of rendition of such decree.

"The court shall render a decree either validating such bonds and the means of payment provided therefor, or adjudging that such bonds and the means of payment provided therefor are, in whole or in part, invalid and illegal.

"Sec. 6. If (a) the superior court shall render a decree validating such bonds and the means of payment provided therefor and no appeal shall be taken within the time prescribed herein, or (b) if taken, the decree validating such bonds and the means of payment provided therefor shall be affirmed by the supreme court, or (c) if the superior court shall render a decree adjudging that such bonds and the means of payment provided therefor, are, in whole or in part, invalid and illegal, and on appeal the supreme court shall reverse such decree and sustain the validity of such bonds and the means of payment provided therefor (in which case the supreme court shall issue its mandate to the superior court requiring it to render a decree validating such bonds and the means of payment provided therefor), the decree of the superior court validating such bonds and the means of payment provided therefor shall be forever conclusive as to the validity of such bonds and the validity of the means of payment provided therefor as against the unit and as against all taxpayers and citizens thereof, to the extent of the matters and things pleaded or which might have been pleaded, and to such extent the validity of said bonds and means of payment thereof shall never be called in question in any court in this State.

"Sec. 7. The costs in any action brought under this Act may be allowed and apportioned between the parties or taxed to the losing party, in the discretion of the court.

"Sec. 8. If the complaint in any action brought under this Act, or an exhibit attached to such complaint shows that an ordinance or resolution has been adopted by the unit providing that a tax sufficient to pay the principal and interest of the bonds or notes involved in such action is to be levied and collected, such ordinance or resolution shall be construed as meaning that such tax is to be levied without regard to any constitutional or statutory limitation of the rate or amount of taxes, unless such ordinance or resolution declares that such limitation is to be observed in levying such tax."

By the provisions of sections 4 to 8, inclusive, of chapter 186, Public Laws of North Carolina 1931, as amended by chapter 290, Public Laws of North Carolina 1935, the General Assembly of North Carolina, in which are vested all the legislative powers which reside primarily in the people of this state, subject only to limitations contained in the Constitution of the United States and in the Constitution of North Carolina, has authorized any local governmental unit in this state, as defined in section 1 of

the act, whose governing body, in the exercise of its statutory powers, has ordered and directed that bonds of said unit for the purpose of funding or refunding its existing valid indebtedness shall be issued and sold, before the said bonds are issued or offered for sale, to institute in the superior court of this state an action in which the said court shall have power to render a decree or judgment that said bonds are or are not valid. action authorized by the statute is in the nature of a proceeding in rem, and is adversary both in form and in substance. statute contemplates that issues both of law and of fact may be raised by pleadings duly filed, and that such issues shall be determined by the court. The court has no power by virtue of the statute to validate bonds which are for any reason invalid. It has power only to determine whether or not, on the facts as found by the court and under the law applicable to these facts, the bonds are valid. This is a judicial power, and, in its exercise, the court is performing a judicial function. The contention of the plaintiff in this action to the contrary cannot be sustained. This contention is not supported by either Tregea v. Board of Directors of Modesto Irrigation District, 164 U.S. 179, 17 S.Ct. 52, 41 L.Ed. 395, or by Wright v. McGee, 206 N.C. 52, 173 S.E. See People v. Linda Vista Irrigation District, 128 Cal. 477, 61 P. 86, Fidelity National Bank & Trust Company of Kansas City v. Swope, 274 U.S. 123, 47 S.Ct. 511, 71 L.Ed. 959, and O'Neal v. Mann. 193 N.C. 153, 136 S.E. 379.

The contention that an owner of taxable property within the unit, or a citizen residing therein, may be deprived of his property, without due process of law, or contrary to the law of the land, by a decree or judgment in the action declaring or adjudging that the bonds and tax to be levied for their payment, are valid, because it is not required by the statute that his name shall appear in the summons or in the complaint, or that the summons shall be served on him personally, cannot be sustained. The action is declared by the statute to be in the nature of a proceeding in rem. In such case, all persons included within a well-defined class may be made parties defendant, and service of summons by publication is sufficient, although such persons are not named in the summons. See Bernhardt v. Brown, 118 N.C. 700, 24 S.E. 527, 715, 36 L.R.A. 402. In the opinion in that case it is said summons may be served by publication, in cases authorized by law, in proceedings in rem.

It is further provided in the statute that, where a decree or judgment has been rendered in an action instituted and prosecuted in accordance with its provisions, declaring or adjudging that the bonds and the tax to be levied for their payment, are valid, such decree or judgment shall be binding and conclusive as against all taxpayers and citizens, of the unit, to the extent of all matters and things which were or which might have been pleaded in the action, and that, with respect to such matters and things, the validity of the bonds and the tax shall not be called in question in any court of this state.

The contention that by this provision an owner of taxable property within the unit, or a citizen residing therein, is estopped from challenging the validity of the bonds and of the tax, without having had an opportunity to be heard, cannot be sustained. No decree or judgment adverse to his rights can be rendered in an action instituted and prosecuted in accordance with the provisions of the statute, until every taxpayer and citizen of the unit has been lawfully served with summons, and until he has had ample opportunity to appear, and file such pleadings as he may wish. If he has failed to avail himself of his constitutional rights, which are fully protected by the statute, he has no just ground of complaint that the court will not hear him, when he invokes its aid after the decree of judgment has been finally rendered, and others have relied upon its protection.

After full and careful consideration, we are of the opinion that there was no error in the holding of the judge of the superior court, at the trial of this action, that sections 4 to 8, inclusive, of chapter 186, Public Laws of North Carolina 1931, as amended by chapter 290, Public Laws of North Carolina 1935 (see sections 2492(55) to 2492(59), inclusive, Code N.C. 1935), are not unconstitutional, either on the ground that the statute confers nonjudicial functions on the superior courts of this state, or on the ground that the statute denies due process of law to taxpayers or citizens of a local governmental unit in this state, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, or of the seventeenth section of article 1 of the Constitution of North Carolina.

The only issues of fact arising on the pleadings in this action involve the validity of the indebtedness of Stanly County which the defendants propose to fund by the issuance and sale of the bonds of said county, designated as "School Funding Bonds" and "General Funding Bonds," and the purposes for which said indebtedness was incurred. These identical issues were submitted to the jury at the trial of the action entitled "Stanly County, plaintiff, vs. Each and all the owners of taxable property within the County of Stanly, and each and all the citizens residing in said County, and J. N. Auten on his own behalf and on behalf of all other taxpayers and citizens of the County of Stanly, defendants."

These issues were answered in the affirmative, that is, the jury found that the said indebtedness is valid and was incurred for

lawful purposes. The decree or judgment in that action is binding and conclusive on the plaintiff in this action. It is expressly so provided in the statute, which recognizes and applies to the action authorized by the statute the principle stated in Eaton v. Graded School Dist., 184 N.C. 471, 114 S.E. 689, as follows: "Except where some special private interest is shown, it seems to be established, by the clear weight of authority, that, in the absence of fraud or collusion, a final judgment on the merits rendered in a suit by a taxpayer (usually brought on behalf of himself and others similarly situated), involving a matter of general interest to the public, and instituted against a governmental body or local board, which, in its official capacity, represents the citizens and taxpavers in the territory affected, is binding on all the residents of the district, if adverse to the plaintiff, and all may take advantage of it if the judgment be otherwise." See cases cited.

We find no error in the judgment in this action. It is affirmed.

(2) Estoppel by Recital

It is familiar history that the federal courts were the chief refuge of municipal bondholders in the railroad aid and haphazard public improvement bond era of the nineteenth century. There were times when bondholders' suits crowded the docket of the Supreme Court. One major protective device developed in that experience was the doctrine of estoppel by recital. Illustrative recital clauses will be found in the case which follows and in the bond form in the transcript. It will not be attempted here to spell out all the refinements of the subject. Broadly speaking, if a bond recited that all legal conditions precedent to its issuance had been met and the recital had been made by officers whose duty it was to ascertain the facts and who had authority to make the recital (usually implied) bona fide purchasers could effectually rely upon the recital notwithstanding actual irregularities in matters covered by the recital. In principle this related only to matters of procedure; a recital could not obviate a want of power. Both debt limits and election requirements could usually, however, be put in the procedure category. See generally II Dillon, Mun.Corps. § 904 et seq. (5th ed. 1911). The basic distinction has, moreover, not always been observed, Getz v. City of Harvey, 118 F.2d 817 (C.C.A.7th, 1941).

As the doctrine was developed in the federal cases, a general recital was as effective as a specific one for most purposes. To silence constitutional questions a general recital had to be broad enough to cover them and not be confined to compliance with

statute. The debt limitation cases, however, led bond counsel to the view that the only safe position as to debt limits was to demand a particular recital that bonds were within the constitutional debt limitation. The cases are discussed in II Dillon op. cit. supra, § 922 et seq. The recital clause in the bond form in the transcript carefully covers constitutional as well as statutory matters and is specific as to debt limits. For a collection of estoppel cases see Notes 86 A.L.R. 1057, 1129 (1933) and 158 A. L.R. 938 (1945).

In some cases where the governing statute commanded that a public record be made of facts constituting statutory or constitutional conditions precedent to the regular issuance of municipal bonds, as where a public record of indebtedness as well as assessed valuations was required, it was determined that the ascertainment of compliance with the law has not been left to the cognizant officers but was to be established as a matter of objective fact. This, in short, put the onerous burden on the bond purchaser to examine the record and satisfy himself as to possible irregularities. Sutliff v. Lake County Commissioners, 147 U.S. 230, 13 S.Ct. 318 (1892). The fact that each bond of an issue shows on its face the aggregate amount of the issue is not enough to prevent an estoppel unless the issue, considered alone, would exceed the permissible percentage of taxable values. Ordinarily, it would be necessary, in addition, that there be facts of record sufficient to enable one to make a debt limit computation in relation to taxable values, outstanding debt and items deductible in determining net debt.

That the federal courts were able to construct their own independent doctrine of estoppel by recital is explained by reference to Swift v. Tyson, 16 Pet. 1 (1842), which left those courts free to "find" the applicable law for themselves in diversity of citizenship cases where the subject was general jurisprudence or commercial law. It is a matter of great importance that since the demise of Swift v. Tyson in 1938 the independent federal doctrine of estoppel by recital has gone by the board. Erie R. R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938). See J. B. Fordham, "Revenue Bond Sanctions" 42 Col.L.Rev. 395, 422 (1942), and references cited. For a long time prior to the Tompkins case the federal decisions were looked to as the important body of law on estoppel by recital and little thought was given to the origin of this distinct federal jurisprudence. Judge Dillon, in his extended discussion of the estoppel cases, makes no mention of Swift v. Tyson.

NEWBERRY LIBRARY v. BOARD OF EDUCATION OF CITY OF CHICAGO

Supreme Court of Illinois, 1945. 390 Ill. 48, 60 N.E.2d 552.

SMITH, JUSTICE. This is an appeal from a judgment of the circuit court of Cook county. The suit was brought by appellants, as plaintiffs, against the board of education of the city of Chicago, appellee. The purpose of the suit was to recover the amount represented by interest coupons attached to certain refunding bonds issued by the board of education.

The complaint is in two counts. The first count is based on interest coupons attached to an issue of refunding bonds issued by the board of education as of September 1, 1934. The second count is based on the interest coupons attached to an issue of refunding bonds issued by the board as of February 1, 1935. The facts are not in dispute. Proof was made under the first count. The facts were stipulated under the second count. The trial court entered judgment in favor of the defendant in bar of the action. The case is here on direct appeal, constitutional questions being involved.

The record discloses that in the years 1928 and 1929, the board of education issued and sold certain tax anticipation warrants, anticipating the collection of taxes levied in those years. On December 11, 1931, the board, acting under an act of the General Assembly of June 28, 1930, Laws of 1930, 1st Special Session, p. 93, Ill.Rev.Stat.1943, c. 122, § 327a et seq., issued the bonds of the district for the payment of such outstanding tax anticipation warrants. In Berman v. Board of Education, 360 Ill. 535, 196 N.E. 464, 99 A.L.R. 1029, we held a similar act which was approved on July 10, 1933, Laws of 1933, p. 1012, invalid, on the ground that it attempted to authorize the board to use the corporate funds of the district for a noncorporate purpose, in violation of section 9 of article IX of the Constitution, Smith-Hurd Stats.

By an act approved on February 28, 1934, Laws 1933–1934, 3d Special Sessions, p. 246, Ill.Rev.Stats.1943, c. 122, § 327.17, et seq., the Legislature attempted to authorize school districts having a population exceeding 500,000 inhabitants to issue refunding bonds, with the consent of the city council expressed by ordinance, for the purpose of paying and discharging "outstanding bonds which are binding and subsisting legal obligations" of the district, without a referendum vote. Acting under this statute, the board of education, as of September 1, 1934 issued its bonds for the purpose of refunding certain outstanding bonds in the sum of \$5,500,000. Included in the bonds refunded were bonds Nos. 1

to 500, in the aggregate amount of \$500,000. The proof shows that bonds Nos. 1 to 500, being one-eleventh, or \$500,000 of the total issue of the refunded bonds, were issued in 1931, for the purpose of paying and discharging outstanding tax anticipation warrants. One-eleventh of the interest represented by the coupons attached to these refunding bonds constitutes the subject matter of the first count of the complaint. In People ex rel. Toman v. Granada Apartment Hotel Corporation, 381 Ill. 41, 44 N.E.2d 606, it was stipulated by the parties in that case that the bonds issued in 1931, for the payment of tax anticipation warrants, and one-eleventh of the refunding bonds issued September 1, 1934, in the amount of \$5,500,000 for the purpose of refunding the bonds issued in 1931, were invalid. They were so treated in that case by this court.

It is stipulated in the record that as of February 1, 1935, the board of education also issued refunding bonds under said act of February 28, 1934, in the amount of \$900,000. The stipulated facts show that these bonds were all issued for the purpose of refunding bonds theretofore issued for the payment of tax anticipation warrants. It is the coupons attached to these bonds which are involved under the second count of the complaint. It was also stipulated in the Granada Hotel case by the parties to that case that this issue of refunding bonds was invalid and they were so treated in that case. Appellants here, however, were not parties to that case. They are not bound by any stipulation in that record or by the decision in that case.

The record shows that the two issues of refunding bonds here involved, after they had been approved by an opinion of the attornevs designated by the purchasers, were purchased by a syndicate of banks. The banks in turn sold the bonds in the open market to their customers. Some of the present holders of the bonds. at the time they purchased the same, were furnished with copies of the opinion of the attorneys approving the proceedings of the board and the bonds issued. Interest was paid on the whole issue of \$5,500,000 of refunding bonds, issued as of September 1, 1934, until the due date of the second installment of interest in 1943. When the coupons on the whole issue of \$5,500,000, were presented for payment in 1943, being coupons No. 17, the board paid ten-elevenths of the amount of the coupons and refused to pay one-eleventh part of each coupon. It based its refusal on the fact that, included in the bonds refunded by that issue, there was an item of \$500,000 of refunded bonds which were issued to pay tax anticipation warrants. Hence, it declined to pay interest on the one-eleventh part of such issue. At to the \$900,000 of refunding bonds issued February 1, 1935, it refused to pay any part of the second installment of interest due in 1943, represented by coupon No. 16. This refusal was based on the ground that all of said bonds were issued for the purpose of refunding bonds in a like amount which were issued for the payment of tax anticipation warrants.

This suit was then brought to recover the unpaid one-eleventh part of the second installment of interest due in 1943, on the issue of \$5,500,000 refunding bonds issued as of September 1, 1934, and also to recover the full amount of the interest coupons for the second installment, due in 1943, on the \$900,000 refunding bonds which were issued on February 1, 1935. The issue involved is the liability of the board of education for the payment of those interest coupons. While only the coupons are here directly involved, the liability of the board of education to pay such coupons depends upon its liability to pay the bonds to which the coupons were attached.

In view of our decisions in People ex rel. Reconstruction Finance Corporation v. Board of Education, 386 Ill. 522, 54 N.E.2d 508; Chicago City Bank and Trust Co. v. Board of Education, 386 Ill, 508, 54 N.E.2d 498; Leviton v. Board of Education, 385 Ill. 599, 53 N.E.2d 596; People ex rel. Toman v. Granada Apartment Hotel Corporation, 381 Ill. 41, 44 N.E.2d 606, and Berman v. Board of Education, 360 Ill. 535, 196 N.E. 464, 99 A.L.R. 1029, the question of the invalidity of the bonds involved cannot be regarded as an open question. While it is true that appellants were not parties to those cases and are not bound by them in the sense that they are res judicata, those decisions, until overruled, are the law of this State and binding upon this court. In those cases we definitely held that tax anticipation warrants are not liabilities of the municipality or school district by which they are issued. They are not, and cannot be, corporate obligations under section 9 of article IX of the Constitution. Those cases further hold that the changing of tax anticipation warrants into bonds issued for their payment does not make them corporate liabilities. They also hold that issuance of bonds for the purpose of refunding bonds which were issued for the purpose of paying tax anticipation warrants does not change the character of the liability. They further hold that even a judgment entered on tax anticipation warrants cannot be paid with the corporate funds of the school district. If the supposed liability has its inception in a tax anticipation warrant, such liability is still based upon such warrant in whatever form the claim may thereafter assume. The invalidity of the original claim cannot be avoided by simply changing the form in which it is presented in an effort to conceal its identity.

Realizing the force of these decisions, appellants do not contend that the bonds here involved are legal liabilities of the school

district. Their contention is that inasmuch as the board of education of the city of Chicago is an independent corporate body in which the statute has vested the power to issue bonds, it also has the power to determine when the conditions exist which authorize it to exercise the authority granted and to issue bonds. Otherwise stated, the contention is that where there is lawful power to issue bonds under some state of facts, the board has the power to determine the existence of the necessary precedent facts and is estopped, as against bona fide holders of its bonds, to deny the existence of such precedent facts, represented by it to exist. Specifically, it is contended that the act of February 28, 1934, authorized the board of education to issue refunding bonds to pay and discharge outstanding bonds which were binding and subsisting legal obligations of the district, and that, in consequence of this grant of power, the board had the right to determine that the conditions precedent to the exercise of the power existed; that having found that the refunded bonds were "binding and subsisting legal obligations" of the district, and having issued the bonds here involved for the payment of such obligations, the board is estopped, as to bona fide holders, from denying that the bonds refunded were "binding and subsisting legal obligations" of the district.

In support of this contention, appellants rely upon a recital contained in the bonds themselves. This recital is as follows: "It is hereby certified and recited that this bond is authorized by and is issued in conformity with all requirements of the Constitution and laws of the State of Illinois; that all acts, conditions and things required to be done precedent to and in the issue of this bond and precedent to and in the issuance of the bonds hereby refunded have been properly done, happened and been performed in regular and due form and time as required by law. That the indebtedness represented by the bonds hereby refunded was a valid and legal obligation of said Board of Education of the City of Chicago and that the total indebtedness of said Board of Education of the City of Chicago including this bond did not at the time of the issuance of the bonds hereby refunded and does not now exceed any constitutional or statutory limitations, and that provision has been made for the collection of a direct annual tax upon all the taxable property in said School District sufficient to pay the interest hereon and the principal hereof when the same matures." It is insisted that, by this recital, the board is estopped from asserting that the bonds refunded were not valid and legal obligations of the board of education.

In support of their able and plausible argument on the application of the doctrine of estoppel, appellants cite and rely upon many Federal decisions and also the decisions of a number of the courts of foreign jurisdictions. A careful examination and analysis of the cases cited in connection with the particular facts involved in each case demonstrates, however, that they do not carry the doctrine of estoppel to the extent to which appellants would apply it. While many of the cases cited contain language which supports the rule contended for, still in those cases in which the question was directly involved upon the facts, the rule under which the doctrine has been applied is limited and confined within a much smaller scope than that contended for by appellants. A reference to only a few Federal cases will suffice to demonstrate such limitations, as expressed by those courts.

In Katzenberger v. City of Aberdeen, 121 U.S. 172, 7 S.Ct. 947, 949, 30 L.Ed. 911, it was said: "But it is insisted that the city is estopped, by the recital in the bonds, from denying that they were lawfully issued. The recital is, in effect, that they were issued 'under and pursuant' to law, the charter of the city, and the ordinance of April 26, 1870. As has been seen, neither the charter, nor any other law of the state, conferred in express terms power on the city to issue these bonds under any condition of facts. The ordinance of the mayor and selectmen directing their issue is not of itself enough. Legislative authority, express or implied, to pass the ordinance, must be shown. The recital, therefore, in its present form, is of matter of law only, because it implies the existence of no special facts affecting the case, except the issue of the bonds under the ordinance to pay the subscription to the stock without any vote of the electors to be taxed therefor. It is in effect nothing more than a recital that bonds issued under such circumstances were 'under and pursuant' to law and the charter of the city. Such a recital does not estop the city from asserting the contrary. To hold otherwise would be to invest a municipal corporation with full legislative power, and make it superior to the laws by which it was created."

In Board of County Commissioners v. Graham, 130 U.S. 674, 9 S.Ct. 654, 656, 32 L.Ed. 1065, the bonds contained a recital quite similar to that contained in the bonds in this case. It was there said: "Recurring, then, to a consideration of the recitals in the bonds, we assume, for the purposes of this argument, that they are in legal effect equivalent to a representation or warranty or certificate on the part of the county officers that everything necessary by law to be done has been done, and every fact necessary by law to have existed did exist, to make the bonds lawful and binding. Of course, this does not extend to or cover matters of law. All parties are equally bound to know the law; and a certificate reciting the actual facts, and that thereby the bonds were conformable to the law, when, judicially speaking, they are not, will not make them so, nor can it work an estoppel upon the

county to claim the protection of the law. Otherwise it would always be in the power of a municipal body, to which power was denied, to usurp the forbidden authority, by declaring that its assumption was within the law. This would be the clear exercise of legislative power, and would suppose such corporate bodies to be superior to the law itself." . . .

In Shelby County, Tex. v. Provident Savings Bank & Trust Co., 5 Cir., 54 F.2d 602, 606, the Circuit Court of Appeals for the Fifth Circuit, after reviewing many cases on the subject, said: "This being so, purchasers of the bonds could not rely on recitals inconsistent with what they knew or were chargeable with knowing. No action of the Legislature could have the effect of enabling a county, by representations or recitals, to estop itself to deny the validity of what by constitutional provisions the Legislature was forbidden to authorize the county to do."

It will thus be seen that the rule as announced by the Federal courts is that the doctrine of estoppel may not be invoked where there is a lack of constitutional authority to issue the bonds involved. Nevertheless, whatever might be the rule in the Federal courts, it is not binding on this court. It is settled that the State law and the decisions of the State courts control as to questions concerning the validity of bonds issued by a municipality, as well as in other cases arising under the Constitution and statutes of a State. Huddleston v. Dwyer, 322 U.S. 232, 64 S.Ct. 1015, 88 L.Ed. 1246; Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487.

Appellant contends that there is a distinction between the effect of recitals in case of bonds of original issue and those contained in refunding bonds as affecting the right to defend against payment of refunding bonds because the bonds refunded might be void. We think the facts in this case are sufficient to render a consideration of this point unnecessary. Here the statute vested the school board with authority to issue refunding bonds for the purpose of refunding "outstanding bonds which are binding and subsisting legal obligations" of the district. The refunding bonds recited on their face that they were issued for the purpose of refunding "outstanding bonds which are binding and subsisting legal obligations." This created a specific condition that the bonds refunded were "legal obligations," which required something more than a mere investigation of the power to issue the refunding bonds. Because of this fact it is unnecessary to analyze the difference, if any, of principles recited under this point, since the legality of the original issue of bonds is necessary in order that they may be lawfully refunded.

While it is true, as contended by appellants, this court has never directly passed upon the specific question here involved, yet we believe this court has, in a great many cases, announced principles and reached conclusions which are controlling and decisive of this case. These decisions state the rule clearly recognized by the Federal courts in the above cases. . . .

The rule deducible from the above authorities is that recitals contained in bonds issued by a municipal or quasi-municipal corporation, in so far as such recitals relate to the existence of facts, where the authority to determine the existence of such facts is expressly or by necessary implication conferred upon the officers issuing the bonds by the statute conferring the power, are binding upon the municipality. The rule is further that recitals as to questions of law are beyond the powers of the authority issuing the bonds and cannot operate as an estoppel. Where there is an absolute lack of power to issue the bonds, no recitals of either law or fact contained therein can be availed of even by bona fide holders.

Turning to the act of February 28, 1934, we find that the power conferred upon the school board to issue refunding bonds was limited to the purpose of refunding outstanding bonds which were binding and subsisting legal obligations of the board of education. The power to determine the legality of the outstanding obligations of the district was not conferred upon the school board. either expressly or by necessary implication. The power to issue refunding bonds was granted only when the district, as a matter of fact, had outstanding bonds which were binding and subsisting legal obligations of the district. Whether the outstanding bonds were binding and subsisting legal obligations of the district was a question of law. That the Legislature never contemplated vesting unlimited authority in the board of education to finally determine whether the outstanding bonds were binding and subsisting legal obligations is definitely indicated by section 2 of the act. That section provides that whenever the board of education desires to issue refunding bonds, as authorized by the act, "it shall adopt a resolution designating the purpose and fixing the amount of the refunding bonds proposed to be issued."

In this case such resolutions were adopted. They are public records of the district, open to public inspection. In accordance with the applicable provisions of the statute, these resolutions were presented to the city council of the city of Chicago. They identified specifically the bonds to be refunded. The city council passed ordinances consenting to the issuance of the refunding bonds. The ordinances particularly specified the bonds to be refunded. The resolutions of the board of education were set out

at length in the ordinances. These ordinances are also public records, open to public inspection. Anyone examining the resolutions or the ordinances would have been apprised of the fact that the refunding bonds were issued for the payment of the bonds refunded, specifically referred to in the resolutions and the ordinances. By reference to the resolutions of the board of education and the ordinances of the city of Chicago under which the refunded bonds were issued, he would have been apprised of the fact, specifically recited therein, that said bonds were issued for the purpose of paying the principal and interest on tax anticipation warrants, issued by the board of education, to anticipate the collection of taxes levied for the years 1928 and 1929. These were all public records. They contained all the facts in connection with the issuance of the refunding bonds as well as the bonds refunded. He would there have ascertained that the refunded bonds were issued for a noncorporate purpose, in violation of section 9 of article IX of the Constitution, and that such bonds were invalid and did not constitute binding and subsisting legal obligations of the board of education. It seems that little else could have been done to have apprised prospective purchasers of the invalidity of both the refunded and the refunding bonds.

Under the cases cited, prospective purchasers could not rely upon a recital contained in the bonds as to their legality, nor that the bonds refunded were binding and subsisting legal obligations of the board of education. Whether they were such obligations was a question of law, dependent upon the legality of the purpose for which the refunded bonds were issued. This was not a question of fact, the final determination of which was vested in the board of education by the statute conferring the power to issue the refunding bonds, either expressly or by necessary implication. The recital on the face of the bonds that they were issued to pay outstanding bonds which were binding and subsisting legal obligations of the board of education was wholly ineffective. Such recitals cannot be invoked under the doctrine of estoppel to deny the board of education the right to assert that the refunded bonds, for the payment of which the refunding bonds were issued. were not binding and subsisting legal obligations of the board of education.

The rule contended for by appellants, if adopted, would result in placing in the hands of the board of education the power to circumvent all restrictions of the Constitution. All they would have to do to avoid such limitations would be to issue tax anticipation warrants, which are not corporate liabilities, and then unlawfully issue bonds to liquidate such noncorporate liabilities. The board could then issue refunding bonds under the act of February 28, 1934, to pay and refund the bonds unlawfully issued

for the payment of the tax anticipation warrants. By reciting in the refunding bonds that the refunded bonds were binding and subsisting legal obligations of the board of education, they would be forever thereafter estopped from challenging such recitals. The result would be that the board of education, by the application of the doctrine of estoppel, would be vested with powers which the Legislature is prohibited by the Constitution from conferring upon it. This is exactly the case here presented. Such a result is expressly prohibited by section 9 of article IX of the Constitution. The purpose of this wholesome provision of the Constitution is the protection of the taxpavers against the unauthorized acts of the board of education, and to limit the use of the money of the taxpayers to corporate purposes. tations of the Constitution operate and protect the taxpavers in whatever form the claim for the payment of noncorporate liabilities may assume or be presented.

The doctrine of estoppel cannot be invoked in this case. The recital in the refunding bonds that such bonds were "issued in conformity with all requirements of the Constitution and laws of the State of Illinois" and that "the indebtedness represented by the bonds hereby refunded was a valid and legal obligation of said Board of Education," cannot prevail against the established facts, shown by the public records made by the board of education in compliance with the statute under which the board was acting in issuing the bonds.

In reaching this conclusion, we are not unmindful of the position in which the purchasers of the refunding bonds now find themselves involved. Nevertheless, this court cannot disregard constitutional restrictions or settled rules of law in the interest of sympathetic inclinations and appeals. Any losses which such purchasers have sustained, or will sustain, are not the fault of either the Constitution or the rules of the law announced.

The judgment of the circuit court of Cook county in bar of the action is affirmed.

Judgment affirmed.

SHAFFER v. WOLFE COUNTY, KY.

District Court of the United States, E. D. Kentucky, 1946, 69 F.Supp. 149.

Ford, District Judge. In 1928 Wolfe County, Kentucky, issued and sold 29 negotiable funding bonds of \$1,000 each bearing interest payable semi-annually at the rate of $5\frac{1}{4}\%$ per annum, maturing 20 years after date, for the purpose of funding a floating indebtedness previously incurred by the county. Nine-

teen of the bonds remain outstanding. The county has renounced the obligation to pay any part of the principal or interest of these bonds on the ground that the debt which they purported to fund was in excess of constitutional limitations.

Alleging that he is the holder and owner of these remaining 19 bonds, that he acquired them in good faith, for a valuable consideration, before maturity and without knowledge of any infirmity in them, the complainant, Earl Shaffer, filed this action under 28 U.S.C.A. § 400 for a judgment declaring the bonds and attached interest coupons valid and enforceable. The county filed answer asserting the invalidity of the bonds for the reasons above stated. The complainant then filed an amended complaint pleading that the county is estopped to assert the defense set up in its answer by reason of the following recital upon the face of each of the bonds:

"This bond is issued by the Fiscal Court of said County pursuant to the provisions of the Constitution of the Commonwealth of Kentucky, Section 1857 et seq. of Carroll's Kentucky Statutes, 1922, and all other laws hereunder applicable, and in conformity with an order of said Fiscal Court duly adopted for the purpose of funding a like amount of legal, valid and subsisting indebtedness of said County.

"And it is hereby certified and recited that all acts, conditions and things required by the law and the Constitution of the Commonwealth of Kentucky to be done precedent to and in the issue of this bond, and precedent to and in the incurring of the indebtedness hereby funded, were and have been properly done, happened and been performed in regular and due form, and time, as required by law; that the indebtedness hereby funded was a valid, subsisting and legal obligation of said County; that the total indebtedness of said County, including this bond, does not now, and did not at the time of the incurring of the indebtedness hereby funded, including said indebtedness, exceed the constitutional or statutory limitations; and that provision has been made for the collection of an annual tax sufficient to pay the interest on this bond and to create a sinking fund for the payment of the principal at maturity."

The defendant has moved to strike the amended complaint on the ground that under the law of Kentucky the recitals set out in the bonds do not constitute or raise the estoppel asserted.

In support of the motion to strike, the defendant relies upon Pulaski County v. Ben Hur Life Association, 1941, 286 Ky. 119, 149 S.W.2d 738, and Kentucky Utilities Co. v. City of Paris, 1933, 248 Ky. 252, 58 S.W.2d 361, contending that, properly interpreted, these cases disclose that the Kentucky Court of Appeals has established the rule that recitals in bonds such as those incor-

porated in the bonds here involved do not constitute an estoppel against the county to show that the bonds were in excess of constitutional authority, and that since, under Erie R. Co. v. Tompkins, 1938, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, it is the duty of this court to apply the law as announced by the highest Court of the State, previous adjudications to the contrary should not be followed.

Without considering whether the defendant's interpretation of the above-mentioned Kentucky cases is correct, it is sufficient to point out that they were decided many years after the bonds here in question were issued and sold.

At the time of the issuance of the bonds, the law established by numerous decisions of Federal Courts, in the lawful exercise of diversity of citizenship jurisdiction, was that a bona fide purchaser of such bonds was entitled to accept recitals such as those above set out as stating the truth and as against such purchaser the county was estopped to allege the contrary and would not be heard to say that the bonds were in excess of constitutional authority. Gunnison County Commissioners v. Rollins, 1899, 173 U.S. 255, 19 S.Ct. 390, 43 L.Ed. 489; Presidio County v. Noel-Young Bond Co., 1909, 212 U.S. 58, 29 S.Ct. 237, 53 L.Ed. 402; Henderson County v. Sovereign Camp, 6 Cir., 1926, 15 F.2d 883; First Trust Co. v. County Board of Education, 6 Cir., 1935, 78 F.2d 114; Royal Oak Drain District v. Keefe, 6 Cir., 1937, 87 F.2d 786; Pulaski County v. Eichstaedt, 6 Cir., 1940, 110 F.2d 79; Knott County v. Aid Association for Lutherans, 6 Cir., 1944, 140 F.2d 630.

Neither the diligence of counsel nor our own research has disclosed any adjudication by the Kentucky Court of Appeals prior to the issuance of the bonds in question which even tended to establish or declare a contrary rule. The only reference to the point found in prior Kentucky decisions indicates no lack of acquiescence in the established federal rule. Green v. Shortell, 116 Ky. 108, 75 S.W. 251.

Even in cases involving the construction of state constitutions and statutes, in respect to which, under section 34 of the Federal Judiciary Act of 1789, 28 U.S.C.A. § 725, the duty of the federal courts to follow the decisions of the state courts has always been recognized, nevertheless where, in the absence of state court decisions, the federal courts have construed such provisions involving contract rights, subsequent state court decisions to the contrary have been denied such retroactive effect as to impair contract rights which accrued under the prior federal decisions rendered in the absence of state court decisions on the question. Concordia Insurance Co. v. School District, 282 U.S. 545, 553, 554,

51 S.Ct. 275, 75 L.Ed. 528; Loeb v. Columbia Township Trustee, 179 U.S. 472, 493, 494, 21 S.Ct. 174, 45 L.Ed. 280.

The rights of the parties must be determined according to the law as it was judicially declared to be when the bonds in question were put on the market as commercial paper. That such is the accepted and established law, has been frequently declared not only by the Federal Courts, Douglass v. County of Pike, 101 U.S. 677, 687, 25 L.Ed. 968; Taylor v. Ypsilanti, 105 U.S. 60, 26 L.Ed. 1008; Green County v. Conners, 109 U.S. 104, 3 S.Ct. 69, 27 L.Ed. 872; Bolles v. Brimfield, 120 U.S. 759, 7 S.Ct. 736, 30 L.Ed. 786, but likewise by the highest Court of the State of Kentucky, Great Atlantic & Pacific Tea Co. v. Scanlon, 266 Ky. 785, 100 S.W.2d 223; Eagle v. City of Corbin, 275 Ky. 808, 122 S.W.2d 798; Payne v. City of Covington, 276 Ky. 380, 123 S.W.2d 1045, 122 A.L.R. 321; World Fire & Marine Insurance Co. v. Tapp, 279 Ky. 423, 130 S.W.2d 848; and Mutual Life Insurance Co. v. Bryant, 296 Ky. 815, 177 S.W.2d 588, 153 A.L.R. 422.

"It was at one time supposed that the decisions of the Federal court in such a situation rested upon the ground that the change of decisions of the state court as applied to rights that had already accrued impaired the obligation of contracts, in violation of the Federal Constitution; but later decisions were explained as resting not upon the provision of the Federal Constitution referred to, but upon an exception to the rule that the Federal courts are bound to follow the decisions of the state courts. And while there have been intimations in some of the more recent opinions of a disposition to return to the earlier view, that view can hardly be regarded as re-established. In this connection it is well to remember that the exception is applied only for the protection of rights which have become vested in conformity with the earlier decisions." 14 Am.Jur. § 100, p. 319.

Whatever may be the prospective effect of the late decisions of the Kentucky Court of Appeals upon which the defendant relies, I am unable to find any legal sanction or authority to warrant giving them the retroactive effect for which the defendant contends.

For the reasons stated, the motion to strike should be overruled.

Shortly after the Tompkins case was decided the writer, in an editorial comment in Legal Notes on Local Government (Vol. IV, p. 11), emphasized its estoppel doctrine significance and added the two following observations about retroactive state-court law-making, which bear upon the merits of the decision in the principal case:

"The Tompkins decision seems also to be a repudiation of Gelpcke v. Dubuque 29 and Butz v. Muscatine.30 In the former, the court held itself not bound by an Iowa decision interpreting the state constitution adversely to the power of the legislature to authorize railroad aid bonds in view of the fact that the bonds of the City of Dubuque sought to be enforced were issued at a time when the state court was committed to the contrary view. There was language in the opinion which led the profession to believe that the decision was based on the theory that the later state decision impaired the obligation of contract, 31 but in 1923, the Supreme Court repudiated this interpretation and declared that the contract clause related only to state statutes, not to judicial decisions.32 On this state of the law, there being no federal question,33 it would seem that the court, if the Tompkins decision is to be followed, would have but one constitutional course,—to follow the latest state decision declaring the governing state law.

"In the Butz case, after the municipal bonds in question were issued, the state court passed for the first time on a statutory question as to whether such bonds were subject to a tax limit, holding that they were. The Supreme Court refused to follow the state court and held Butz entitled to compel the levy of an unlimited tax to provide means to pay his bonds. There again, no federal question was involved and in such a case it would seem that independent federal court interpretation of state statutes is no longer permissible, even though the transaction in litigation was entered into prior to any state court ruling in point."

The same view was taken in Toole County Irrigation District v. Moody, 125 F.2d 498 (C.C.A. 9th, 1942). David M. Wood, a leading New York bond attorney, has written a doleful discussion of the Toole County case, in which he recognizes that the court reached a correct decision. "Erie Railroad v. Tompkins: Significance of U.S. Supreme Court Ruling to Municipal Bondholders" 136 The Daily Bond Buyer 1174 (June 4, 1942). What Mr. Wood laments is the overthrow of Swift v. Tyson. The gloom, one may suggest, is relieved somewhat by the disposition of some state courts to give overruling decisions a strictly pros-

^{29 [}Footnotes renumbered.] 1 Wall. 175 (1863).

^{30 8} Wall. 575 (1869). The court again brought out the contract clause theory but also relied on the fact that the bonds were issued prior to any ruling in point by the state supreme court and thus that rights had "vested". This notion is developed in Burgess v. Seligman, 107 U.S. 20, 2 S.Ct. 10 (1882).

³¹ At p. 206.

³² Tidal Oil Co. v. Flanagan, 263 U.S. 444, 44 S.Ct. 197 (1924).

³³ It is not perceived that any due process question is involved; retrospective judicial decisions are not uncommon. See the comment of Mr. Justice Holmes, dissenting in Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370, 372, 30 S. Ct. 140 (1910).

pective effect where intervening transactions had been conducted with reference to the law as formerly articulated in the cases. Bramlette v. Stringer, 186 S.C. 134, 195 S.E. 257 (1938). This does not violate the Federal Constitution. Great Northern Rv. v. Sunburst Oil and Refining Co., 287 U.S. 358, 53 S.Ct. 145 (1932). More substantial is the fact that a number of states have embraced the estoppel doctrine by statute. The Louisiana statute goes beyond the federal rule: it does not confine the benefit of the estoppel to bona fide purchasers for value. Gen. Stats. of La. § 8886 (Dart. 1939). The Ohio enactment, on the other hand, simply covers statutory requirements. Ohio Gen.Code § 2293-37 (Page, 1937). As to the possibility of a statutory estoppel based on determinations of fact by a state administrative agency, such as the Michigan Municipal Finance Commission, see Irvin Long, "Some Problems in Special Assessment District Obligations" 46 Mich.L.Rev. 911, 931 (1948).

The estoppel doctrine applies to revenue bonds as well as general obligation paper. Vollmer v. Village of Amherst, 140 Ohio St. 257, 43 N.E.2d 235 (1942). It appears sound in principle, moreover, to apply it in behalf of a bona fide purchaser for value of non-negotiable municipals. This was done without discussion in a case involving non-negotiable revenue bonds. Getz v. City of Harvey, 118 F.2d 817 (C.C.A. 7th, 1941). See also Royal Oak Drainage Dist., Oakland County, Mich., v. Keefe, 87 F.2d 786, 793 (C.C.A. 6th, 1937). It has been asserted, on the other hand, that only a holder in due course may invoke the doctrine. I Jones, Bonds and Bond Securities § 250 (4th ed. 1935).

(3) Short Statute of Limitations

ROBERTS v. EVANGELINE PARISH SCHOOL BOARD

Supreme Court of Louisiana, 1923. 155 La. 331, 99 So. 280.

St. Paul, J. Under the provisions of Act 152 of 1920, § 1, the school boards of Evangeline and Acadia parishes undertook to create the "Basile school district," composed of adjoining parts of the two parishes, having in view a bond issue for the purpose of erecting a public school at Basile in Evangeline parish for the school children of said district. The school board of Evangeline parish was designated the governing authority for said district under the provisions of section 3 of said act.

Said governing authority thereupon authorized an election to take the sense of the qualified taxpayers of said district as to said bond issue and a property tax in support thereof, which election was held in due course and resulted in favor of said bond issue and tax.

More than 60 days after the promulgation of the result aforesaid, the plaintiffs (resident and taxpayers in said district) brought this suit to annul and set aside said election, as also the proposed bond issue based thereon and tax in support thereof.

I.

Plaintiffs attack Act 152 of 1920 as being in conflict with (the spirit of) article 250 of the Constitutions of 1898 and 1913, and article 12, § 10, of the Constitution of 1921; which (they claim) contemplate that, in school matters, the integrity of each parish shall be preserved, and that each parish school board, with its own parish superintendent of education, shall remain the sole authority in the school matters of said parish, subject only to the state board of education.

Plaintiffs further urge that, in any event, said election was illegally conducted, and therefore null; for the reason that but one polling place was provided for in said district, to wit, at Basile in Evangeline parish, and that the voters of Acadia parish were required to (and did) vote outside of the parish where they resided. As to which last, see Milton v. Lincoln Parish School Board, 152 La. 761, 95 So. 386.

Whereupon defendants challenge the authority and deny the jurisdiction of the court herein, as follows:

"And the respondents now plead as a bar to plaintiffs action herein, and as a bar to the right and authority of this honorable court to inquire into said matters the prescription (limitation) of sixty days as provided for in paragraph (n) of section 14 of article 14 of the Constitution of 1921."

II.

Paragraph (n) of section 14 of article 14 of the Constitution of 1921 (pages 105 and 106) reads as follows:

"For a period of sixty (60) days from the date of promulgation of the result of any election held under the provisions of this section, any person in interest shall have the right to contest the legality of such election, the bond issue provided for, or the tax authorized, for any cause; after which time no one shall have any cause or right of action to contest the regularity, formality, or legality of said election, tax provision, or bond authorization, for any cause whatsoever. If the validity of any election, special tax or bond issue authorized or provided for, held under the provisions of this section, is not raised within the sixty (60) days herein prescribed, the authority to issue the bonds, the legality thereof and of the taxes necessary to pay the same shall be conclusively presumed, and no court shall have authority to inquire into such matters.

III.

The Constitution of 1898 provided (article 270) that—

"The General Assembly shall have power to enact general laws authorizing the parochial, ward and municipal authorities of the state, by a vote of the majority of the property taxpayers . . . to levy special taxes in aid of public improvements or railway enterprises; provided," etc.

This was carried into effect by Act 202 of 1898, p. 483, amended by Act 23 of 1904, p. 26.

In June, 1905, under authority of the police jury of Acadia parish, an election was held in the *Third justice of the peace ward*, to authorize a tax in said *ward* in aid of the Opelousas, Gulf & Northeastern Railroad Company, which election resulted favorably to said tax and was duly promulgated. The railroad was completed and operated in 1907. But when in 1908 an attempt was made by the railroad company to collect said taxes, this court held that—

"Under Article 270 of the Constitution of 1898, the Police Jury is without power to order an election for special taxes in aid of a railway enterprise in a Justice of the Peace Ward forming a part of a regular parish ward. The 'ward' mentioned in said article is the political subdivision of the parish commonly called a 'police jury ward.'" Daigle v. Opelousas, Gulf & N. E. Ry. Co., 124 La. 1047, 50 So. 846.

Thus the railroad did not get its taxes; but the people of the "police jury ward" got the railroad, since it could not move away.

The decision was doubtless correct; but the taxes were lost to the railroad simply because the railway officials and attorneys, the parish officials and voters, did not understand that a "ward" did not mean a *justice of the peace ward*.

This opinion was handed down in December, 1909, and became final January, 1910; but at the very next session of the Legislature thereafter held, to wit, May to July, 1910, Act 256 of that year was passed on the same subject-matter, wherein was included section 17, reading as follows (page 432):

"That, for a period of sixty days from the date of the promulgation of the result of any such election, any person in interest shall have the right to contest the legality of such election for any cause; after which time no one shall have any cause of action to contest the regularity, formality, or legality of said election for any cause whatever. If the validity of any election held under the provisions of this act is not raised within the sixty days herein prescribed, then no governing authority of any subdivision herein named, required to levy a tax or issue bonds as authorized at an election or under this act, shall be permitted to re-

fuse to perform that duty and urge as an excuse or reason therefor, that some provision of the Constitution or law of Louisiana has not been complied with, but it shall be conclusively presumed that every legal requirement has been complied with, and no court shall have authority to inquire into such matters after the lapse of sixty days as herein provided." See Act 256 of 1910, § 17, p. 432.

In the same year an act relative to drainage was passed, containing a somewhat similar provision, to wit, Act 317 of 1910 (section 28).

In February, 1912, this court said:

"The prescription, of 60 days, established by section 28 of Act No. 317 of 1910, has no application to proceedings which are not only unauthorized by, but in contravention of, the law, constitutional and statutory." St. Charles Drainage District v. Cousin, 130 La. 331, 57 So. 992.

In 1917 this court held that under section 17 of Act 256 of 1910, an attack upon a bond issue and tax came too late if made more than 60 days after the promulgation of the returns of election, even though the bond issue and tax were attacked on the ground of "unconstitutionality," and the court said:

"The limitation was devised . . . to protect the fisc against uncertainty, and to protect the bonds to be issued from attack, after a reasonable time given to the taxpayers to contest the validity thereof." Morgan's La. & Tex. R. R. & S. S. Co. v. Tax Collector, 142 La. 190, 76 So. 606.

In 1918 this court said in Tremont Lumber Co. v. Police Jury, 144 La. 678, 81 So. 249:

"Defendant's plea of 60 days' prescription [under section 17 of Act 256 of 1910] must also be overruled. If the authority which called the election had no right to do so, then the election was so absolutely null that it amounts to nothing, and cannot be given vitality by prescription"—citing Daigle v. Opelousas, Gulf & N.E. Ry. Co., supra.

IV.

It will thus be seen that in Daigle v. Opelousas, etc., R. Co., 124 La. 1047, 50 So. 846, a tax on the faith of which a railroad had been built was set aside long afterwards on a perfectly legal but very fine ex post facto distinction between a justice of the peace ward and a police jury ward; that is, between the territory for which a justice of the peace is elected and that for which a police juror is elected (generally, coextensive).

It will further be seen that act 256 of 1910 was passed immediately afterwards; that in St. Charles Drainage District v.

Cousin, 130 La. 331, 57 So. 992, this court emasculated the statute of 1910, by denying, in effect, that the limitation fixed by said statute had any application where the *legality* of the tax was involved; that in Morgan's La. & Tex. R. Co. v. Tax Collector, 142 La. 190, 76 So. 606, the court in effect overruled the St. Charles Case, and reinstated the statute of 1910 in full force by holding that the limitation fixed thereby applied even when the *constitutionality* of the tax was involved; and, finally, that in Tremont Lumber Co. v. Police Jury, 144 La. 678, 81 So. 249, this court went back to the doctrine of the Daigle Case decided *before the act of 1910*, and in view of which the act of 1910 appears to have been passed.

V.

It was in this condition of uncertainty, and of vacillation on the part of the court, that the convention of 1921 met. It was as well known to the members of that convention as it is to the members of this court that no bond issue by any public body in this state could be negotiated unless and until this court had passed finally upon that particular bond issue; as fully appears from correspondence in this transcript and in others that have come before us.

Accordingly, that body, which alone had power to give jurisdiction or withhold it from the courts, adopted paragraph (n) of section 14, art. 14, aforesaid. And that paragraph, in terms too plain to be mistakable, clearly witholds jurisdiction from the courts of this state after 60 days. It says:

"And no court shall have authority to inquire into such matters."

And the matters into which "no court shall have authority to inquire" are set forth in the next preceding words of the paragraph, to wit:

"The authority to issue the bonds, the legality thereof and of the taxes necessary to pay the same."

All of which the paragraph declares shall be conclusively presumed and—

"After which [60 days] no one shall have any cause or right of action to contest the regularity, formality, or *legality* of said election, tax provision, or bond authorization, for any cause whatsoever."

VI.

Accordingly the Constitution declares that when 60 days have elapsed after the promulgation of a tax election—

(1) The legality of the election, of the authority to issue the bonds, and of the taxes necessary to pay the same shall be *conclusively* presumed.

- (2) That no person shall have any right of action to contest the legality of said election, tax provision or bond authorization, for any cause whatsoever; and
- (3) That no court shall have authority to inquire into such matters.

The Constitution therefore declares in plain terms that after 60 days the bonds and taxes shall be conclusively held to be valid, that no one shall have the right to question their validity, that no court shall have authority to entertain any controversy over their validity.

And it seems to us that language could not be used to express more strongly the very patent intention of the constitutional convention, to wit, that after 60 days have elapsed without any attack upon a bond issue and tax voted by property taxpayers under color of law, any person may safely purchase such bonds and feel secure that the taxes levied to pay them will be sustained by the courts of this state. The constitutional convention had the right to say this; it did say it, and that is the end of the matter.

The judgment appealed from declining jurisdiction was therefore correct.

Judgment affirmed.

Three judges dissented. Chief Justice O'Niell was emphatic in the opinion that constitutional questions could not be silenced by the asserted sixty-day prescription. The following paragraph from his dissenting opinion is an extraordinary judicial utterance.

"I do not doubt that, if a taxpayer residing in that part of the school district that is in Acadia parish should take this question to the Supreme Court of the United States by writ of error, contending that the construction which the Supreme Court of I.ouisiana has put upon the Act 152 of 1920, and upon paragraph (n) of section 14 of article 14 of the state Constitution, is violative of the due process clause and of the equal protection clause of the Fourteenth Amendment, the ruling now made would be reversed."

A short statute of limitations, not embodied in the constitution, is not likely to be accorded the effect of quieting constitutional questions. It will have been observed from the transcript that the North Carolina Municipal Finance Act contains such a provision. The same is true of the County Finance Act. N.C.Gen. Stats. § 153-90 (1943). The statute is given effect to silence statutory questions but is no bar to attacks on constitutional grounds. Sessions v. Columbus County, 214 N.C. 634, 200 S.E.

418 (1939). Compare this with the effectiveness of a validation decree.

Even though a constitutional short statute of limitations would silence a debt limit question raised by a taxpayer after the period had run or raised later by the unit against bondholders, it does not so modify the duty of the unit to stay within the limit as to enable a taxpayer to compel, by mandamus, issuance of bonds in excess of the limit. The primary purpose of the provision is to protect bondholders; that can be achieved without forcing the excessive issuance of bonds in the first instance. State ex rel. Abney v. Police Jury of St. Tammany Parish, 159 La. 53, 105 So. 97 (1925).

There have been numerous decisions under the Louisiana provision. See Gough v. La Salle Parish School Board, 210 La. 554, 27 So.2d 330 (1946), citing earlier cases.

(4) Curative Legislation

We have already, in Chapter 2, had a look at this subject as affected by constitutional limitations upon local and special legislation. There has been wide use, in states where no constitutional barrier stood in the way, both of blanket and particular validating acts. In Tennessee, for example, where local legislation runs riot, it appears that particular validating acts are almost routine. For an analytical discussion of the subject see F. E. Horack Jr. and C. B. Dutton, "Statutory Validation of Public Bonds" 7 Univ. of Chi.L.Rev. 281 (1940).

CITY OF PACIFIC GROVE v. IRWIN

District Court of Appeal, First District, Division 2, California, 1946. 76 Cal.App.2d 46, 172 P.2d 357.

DOOLING, JUSTICE. By this proceeding in mandamus the petitioner City of Pacific Grove seeks to compel the respondent, who is the city clerk of petitioner, to sign certain improvement bonds of said city aggregating \$120,000 in face value.

It is undisputed that at a special election called by the city council of said city for that purpose and held on July 10, 1945, more than two-thirds of the voters voting at said election voted in favor of the issuance of such bonds. In the procedure leading up to such election the city council was governed by the Bond Act of 1901, Deering's General Laws, Act 5178, and the respondent's refusal to sign the bonds is rested upon the claim that the city council failed to take the following steps required to be taken

by the provisions of the governing statute: 1. The adoption of a resolution of public interest or necessity. 2 The ordinance calling the election did not state the estimated cost of the proposed improvements. 3. The ordinance calling the election did not provide the manner of holding the election and of voting for and against the indebtedness.

It may be admitted that in respect to these three procedural requirements there was not a literal compliance with the provisions of section 2 of the governing statute, although it might be held (a matter which we are not deciding) that the steps taken by the city council constituted a substantial compliance with the law.

On July 19, 1944, the council by more than a two-thirds vote adopted a resolution accepting the report of a post war planning committee, which report contained the recommendation that the two projects, contemplated to be constructed by the proceeds from the sale of the bonds here in question, be undertaken. This report recited among other matters that "these projects will have to be paid for by bond issues, as our study of the city's post war needs shows that the city has no moneys available in its treasury at this time for any of these projects" and further recited that "we unanimously believed that the first four matters are absolute necessities" (included among the first four matters were the two projects here involved). By its acceptance of this report by resolution so adopted it might be argued that the council by resolution passed by a two-thirds vote of its members did determine that the public necessity demands the construction of these projects and that their cost will be too great to be paid out of the ordinary annual income and revenue of the municipality, thus satisfying the requirements of the statute in those particulars. The report recited the estimated cost of the two projects and it might further be argued that by its action in accepting the report the council adopted these estimates as its own. The statute, it should be noted, requires this estimate to be included in the ordinance calling the election, rather than in the preliminary resolution. Subsequently on May 16, 1945, by more than a two-thirds vote, the council adopted a resolution providing in detail for an election to be held on July 10, 1945, for the purpose of submitting the following propositions to the qualified voters of the city:

"Proposition No. 1. Shall the City incur a bonded indebtedness of \$85,000 for the purchase of a site and for the erection thereon of a new fire house, for the purchase of new fire equipment, and for the installation of a fire alarm system?

"Proposition No. 2. Shall the City incur a bonded indebtedness of \$35,000 for the erection of a new bath house, salt water

tub baths, and volley ball courts, at the municipal beach on the site of the present bath house?"

Thereafter, on June 6, 1945, the council by more than a twothirds vote adopted an ordinance calling said election. The ordinance was not in the same detail as the previous resolution but adopted the resolution by reference in the following language:

"All of the contents of Resolution No. 3756 are hereby adopted and incorporated in this ordinance, the same as if they were a part hereof."

Enough has been recited to show the steps actually taken by the council and the particulars in which the procedure departed from a literal compliance with the requirements of section 2 of the Bond Act of 1901. Whether what was actually done constituted a sufficiently substantial compliance to make the procedure valid under that act need not be decided because we are satisfied that the bond election was validated by subsequent act of the legislature.

At the special session of the legislature held at the call of the Governor from January 7 through February 19, 1946, Senate Bill No. 13 was enacted and became a law on February 12, Chapter 17, Chapters 1946, Fifty-Sixth (First Extraordinary) Session.

The portion of that statute here relevant reads:

"All acts and proceedings heretofore taken by any public body under any law, or under color of any law, for the issuance, sale, or exchange of bonds of any such public body for any public purpose are hereby confirmed, validated, and declared legally effective. This shall include all acts and proceedings of the governing board of such public body and of any person, public officer, board or agency heretofore done or taken upon the question of the issuance, sale, or exchange of such bonds." Section 5.

It is settled law in this state that defects in procedural steps leading to the incurring of bonded indebtedness by municipal corporations and other political subdivisions may be cured by subsequent validating statutes enacted by the legislature. City of Redlands v. Brook, 151 Cal. 474, 478, 91 P. 150; Clark v. City of Los Angeles, 160 Cal. 30, 43, 116 P. 722; City of Sacramento v. Adams, 171 Cal. 458, 463 et seq., 153 P. 908; Cole v. City of Los Angeles, 180 Cal. 617, 624, 625, 182 P. 436; City of Venice v. Lawrence, 24 Cal.App. 350, 353 et seq., 141 P. 406. Cf. Miller v. McKenna, 23 Cal.2d 774 and the cases cited on page 781, 147 P.2d 531, on page 535.

The extent to which such curative legislation is effective has been stated by the supreme court as follows in Miller v. McKenna, supra, 23 Cal.2d at pages 781, 782, 147 P.2d at page 535:

"The legislature may cure irregularities or omissions to comply with provisions of a statute which could have been omitted in the first instance. This rule is quoted from Cooley on Constitutional Limitations, at page 457, as follows: 'If the thing wanted or failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute; and if the irregularity consists in doing some act, or in the manner or mode of doing some act, and which the legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by subsequent law.'"

The constitutional limitation upon the power of municipalities to incur a bonded indebtedness is found in the following language contained in Article XI, section 18, of the constitution of California:

"No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose . . ."

It is beyond argument that the legislature would have satisfied this constitutional requirement by providing in advance for the precise procedure followed by the city council in calling this particular election, and under the rule last above quoted it may with equal force ratify it after it has been taken. The propositions were clearly put to the voters at an election held for that purpose and more than two-thirds thereof gave their assent. None of the claimed defects in the steps leading up to the election was jurisdictional in the sense that the constitution made it mandatory upon the legislature to require the things to be done which it is claimed were omitted, and the curative statute was therefore effective to validate the election.

The curative act contains the following provision:

"Sec. 7 (a) This act shall be limited to the correction of defects, irregularities, omissions, and ministerial errors in complying with statutory requirements which the Legislature originally could have omitted from the law under which such acts or proceedings were taken."

In so providing the legislature did no more than to declare that it intended to follow the recognized limitations upon its powers. In this case the curative act may properly be applied without exceeding those limitations.

Let a peremptory writ of mandate issue as prayed.

Nourse, P. J., and Goodell, J., concur.

Chapter 7

REMEDIES AGAINST LOCAL GOVERNMENT— DEBT ADJUSTMENT

SECTION 1. EXECUTION AND GARNISHMENT

These sanctions are of little practical significance. Nowhere is there dissent from the proposition that property of a unit of local government presently devoted to a public use and appropriate to that end is free from execution. "Public use" here is employed in a broad sense. It embraces utility and service properties as well as those employed in the traditional "governmental" activities of local units: it is as broad as the legal functions and activities of local government. Thus, the private property of a local unit subject to execution is likely to be very meagre, if not non-existent. In principle the "public use" exemption applies to garnishment where the local unit is the primary debtor as well as to execution. If a city, which is a judgment debtor of Smith, has a claim against Jones on his official bond the claim would be beyond the reach of Smith because devoted to the public use or object of making good the default of Jones. Some refinements of the execution and garnishment cases are discussed by the writer in "Methods of Enforcing Satisfaction of Obligations of Public Corporations" 33 Col.L.Rev. 28 (1933).

Garnishment directed at a local unit as garnishee has met with some judicial antipathy based on the assumption that it is bad public policy to permit a local unit to be drawn into litigation which is not directly its concern. Statutes making the process available against "corporations" have usually been interpreted to refer only to private corporations. The cases have been reviewed by the writer in "Garnishment of Public Corporation" 39 W.Va. L.Quar. 229 (1933). The liberal Ohio case of Uricich v. Kolesar, 132 Ohio St. 115, 5 N.E.2d 335 (1936), is exceptional. There has been much legislation and some constitutional amendment designed to override the rule of exemption, at least in part. Under the most carefully drawn statutes only the salary or wages of a public employee above a subsistence minimum can be reached and funds provided for public works are not garnishable until the works are completed. See W.Va.Rev.Code §§ 3834(16) and 3834(24) (Michie, 1943).

Only in the New England states may a creditor of a local unit have recourse directly against an inhabitant. In some states the remedy is grounded on statute; in others on immemorial usage. "The property of the inhabitants of counties, towns, cities and other quasi-corporations, may be taken to pay any debt due from the body politic, of which they are members. All sums so paid, with interest and costs, may be recovered of such body politic." Rev.Stats. of Me. c. 49, § 132 (1944). See also Vt.Pub.Laws §§ 2253–2257 (1933). Immemorial usage has been relied upon in Connecticut and Massachusetts. Beardsly v. Smith, 16 Conn. 368 (1844); Chase v. Merrimack Bank, 19 Pick. 564 (Mass.1837).

BULLIS v. TOWN OF JACKSON

Court of Appeals of Louisiana, First Circuit, 1941, 1942. 4 So.2d 550.

LE BLANC, JUDGE. The plaintiff in this suit is a practicing attorney at law who obtained a judgment against the defendant municipal corporation, the Town of Jackson, Louisiana, for legal services rendered in the year 1934. The judgment is for the sum of \$300 with legal interest and it became final in the month of June, 1935. See Bullis v. Town of Jackson, La.App., 162 So. 82. The defendant having failed or neglected to pay plaintiff the amount due him under the judgment, he has resorted to legal process in order to enforce payment.

In his original petition, after having alleged failure, neglect or refusal to pay on the part of the defendant, plaintiff prays that a writ of mandamus be issued by the court commanding it to pay him the said judgment out of funds in its possession, or, in the alternative, out of the revenues of its gas franchise, or, again in the alternative, that it be required to budget the same as a debt and to levy a sufficient tax and collect the same with which to pay him.

In answer to a rule to show cause the defendant filed an exception of no right of action and of no cause of action. Plaintiff then filed another petition in which he set out in detail the facts out of which the original suit brought by him for attorney's fees arose and on which judgment was rendered. In this petition he alleges that his services were in connection with preparing and having passed the necessary ordinances for the erection and installation of a natural gas system in the Town of Jackson and the sale of the bonds issued in connection therewith. He claims that as a result he has a privilege on the gas plant which is subject to execution as it is not a governmental function of the municipality but a private enterprise.

Further pleading in the alternative, plaintiff alleges that a writ of mandamus should issue because it is unjust for the Town of Jackson to take advantage of its position; that its gas system is extremely profitable and that it has enough revenues from

other sources to meet its governmental expenses, including his judgment. He avers that it could easily pay the same in any of the following ways: (1) Out of cash on hand, (2) from the proceeds of the gas plant, (3) by levying a tax to pay the same as part of the costs of the plant, or (4) by increasing the price of gas, (5) by increasing the occupational license tax, or (6) by reducing unnecessary expenses. The prayer of his petition is for a rule to show cause why a writ of mandamus should not issue requiring the town to budget his judgment as part of its expenses and to pay the same out of its current revenues, or "to pay the same in one or all of the methods recited." In the alternative he prays that a writ of execution issue commanding the sheriff of the parish to seize and sell the gas plant and from the proceeds that he be paid his judgment by preference and priority over all other creditors of the town.

In answer to this new petition the defendant municipal corporation filed a motion to elect and that plaintiff be made to state on which particular cause of action he relied, and also exceptions of no cause or right of action and of vagueness. The motion to elect and the exception of vagueness were overruled, the court reserving its ruling on the exception of no cause or right of action. Answer was then filed in which the defendant denied practically all the allegations made by plaintiff and then further answering, averred that it has not refused to pay plaintiff's judgment but that it could not pay the same until and unless it had made provisions for all statutory, necessary and usual charges; that it had prepared its budget of anticipated revenues and expenses for the fiscal year beginning October 1, 1940, and there remained no excess in the revenues with which to pay the same. Further, it averred, that it had imposed all taxes and licenses it could legally levy and that the revenues to be derived therefrom would be sufficient only to meet its statutory, usual, and necessarv charges and expenses.

After trial in the court below there was judgment in favor of the defendant in rule and against the plaintiff dismissing the rule at his costs. From that judgment he has taken this appeal.

In this court the defendant has again filed and is pressing its motion to elect and its exception of no cause of action. With regard to the motion to elect, although plaintiff's pleadings may appear a bit involved, we are of the opinion that he intended throughout and did protect each cause of action he tried to disclose by making each plea in the alternative. Without deciding whether plaintiff's two demands, one for a writ of mandamus and the other seeking execution against certain property, are inconsistent or not, the rule is that even when inconsistent demands are made in the same proceedings and insisted upon, they are not

inconsistent when made alternatively. Hass et al. v. McCain, 161 La. 114–119, 108 So. 305; Smith v. Donnelly, 27 La.Ann. 98. The point raised under the exception of no cause or right of action is that if plaintiff is entitled, as he claims to be, to execution on his judgment, he cannot obtain mandamus as that writ is an order directed to an individual or corporation directing the performance of some ministerial duty and can only issue in cases where the law has assigned no relief by ordinary means. Code of Practice Arts. 829 and 830. It is contended that since execution is such a form of relief, the cause of action for mandamus should therefore not be allowed. We must say that there is much merit in the contention urged but inasmuch as we think that the case was properly disposed of on the merits in the court below we prefer to decide it in that manner also.

Taking up plaintiff's right to have the gas plant of the defendant town subject to levy under execution first, we readily agree with the trial judge that under the proof adduced that plant is shown to be a public utility, built by the municipality from the proceeds of a bond issue voted by the citizens and taxpayers of the town, and, as such, is dedicated to public use, and is not a private enterprise. As property dedicated to the use of the public, it is not subject to execution by an ordinary creditor of the town in satisfaction of a purely personal judgment. "Property dedicated to public use, not owned by municipality as corporation, but by public, is exempt from seizure and sale for municipality's debts." Town of Farmerville v. Commercial Credit Company, 173 La. 43, 136 So. 82, 76 A.L.R. 686. In that case execution was sought against a waterwork system which was municipally owned and operated, and certainly in our opinion, the same rule of law therein laid down would apply to a gas system or plant, also a public utility similarly owned and conducted. In Porter v. Town of Ville Platte, 158 La. 342, 104 So. 67, 69, a mechanic's lien and privilege was sought to be enforced against a water-works system owned and operated by the municipality which the court refused to recognize, holding that the plaintiff was entitled to judgment in personam. The authorities touching upon the right of a creditor to seize and execute on property of a municipal corporation in satisfaction of his debt were received at length, and the court stated: "The legal principle governing all of these cases is that title to such property is held in trust for the public, and therefore can no more be sold to satisfy the debts of a state or other political subdivision than can any other trust property be sold to satisfy the debts of any other trustee."

The right of the plaintiff to obtain relief under all the various forms sought by him, by mandamus has to be determined more or less on the facts as adduced and found in the record.

It is not shown, but we presume in the absence of any other form of organization or charter, that the Town of Jackson is incorporated under the General Municipal Corporation Statute of this State, Act 136 of 1898. That act provides that: "All expenditures of money for any purpose whatever shall be in pursuance of a specific appropriation made by order, and in no other manner." Section 31. Further, under its provisions it is made the duty of the Mayor and Board of Aldermen to make an annual budget of anticipated revenues and expenditures at the beginning of each fiscal year on October 1st, and to publish the same. By the terms of Act 32 of 1902 they are prohibited from making any appropriation, approving any claim or making any expenditure from the revenues of any one year which shall, separately, or together with others, be in excess of the anticipated revenues of that year. The said revenues are to be dedicated to the payment of all statutory charges, the payment of charges for services rendered annually under time contracts and all necessary, usual charges provided for by ordinance or resolution. It is only an excess of revenue, if any, above these stipulated charges, that may be applied to the payment of amounts due and unpaid out of the revenues of former years.

The proof offered in this case shows that the defendant municipal corporation followed the provisions of the law relative to making its budget for the fiscal year beginning October 1, 1940. and from the same it appears that there was no excess in revenues over and above the charges stipulated by law, out of which plaintiff's judgment could have been paid. In the case of State ex rel. Ascension Red Cypress Co. v. New River Drainage District et al., 148 La. 603, 87 So. 310, citing 18 R.C.L. 227 as authority, it is stated that: "Want of funds is a complete answer to petition for mandamus to compel governing authorities of a political corporation to pay a judgment against the corporation unless the corporation has authority to collect revenues with which to pay the judgment." It may be that some of the items budgeted by the defendant town as expenditures appear to be a bit high, but there is certainly no proof to show that they are inflated or were arbitrarily fixed with the idea of padding the budget to escape the payment of and legitimate debts due by it. Besides, the framing of their budgets seems to be a matter which is left to the discretion of the town councils, and courts are without authority to regulate them in preparing or supplementing the same. State ex rel. Lorenz v. City Council of New Orleans, 116 La. 851, 41 So. 115.

Mandamus as sought by plaintiff in having the defendant town directed to levy an additional tax as part of the cost of its gas plant or increasing the occupational license tax, in order to pay

its judgment, cannot issue for the reason that "the right of a political corporation or subdivision of the state to levy taxes must be conferred in terms. It is not to be implied from the mere fact that the Legislature has created the corporation." State ex rel. Ascension Red Cypress Company v. New River Drainage District, supra. Neither, do we find any authority in law by which the court could enforce the town to increase the rate in the price of natural gas sold to consumers, in order to pay plaintiff's judgment, and with regard to the demand that the town reduce unnecessary expenses in order to provide funds with which to pay him, plaintiff has submitted no proof to show that the town has incurred any such unnecessary or exorbitant expenses, and for that reason, if for none other, the relief sought by him could not be obtained on that ground.

The trial judge, we think, correctly and properly disposed of all the issues presented in the rule to show cause and in plaintiff's failure to have pointed out manifest error, the judgment which dismissed the same is hereby affirmed at his costs.

While the principal case was on appeal Bullis sought to garnish the Town's Gas Bond Account in a local bank, which had been set up to meet debt service on the gas bond issue. Since, in the original action below, the trial court had held that this account could not be reached by mandamus to satisfy the claim of Bullis, the original judgment was determined to be res adjudicata as to garnishment. Bullis v. Town of Jackson, 9 So.2d 844 (1942). The Supreme Court, however, reversed this ruling on the theory that res adjudicata did not apply because the two proceedings were separate and between different parties, which left Bullis entitled to be heard on the merits as to whether the fund was strictly devoted to a public use or purpose. 203 La. 289, 14 So.2d 1 (1943).

Even if a bond retirement fund exceeded current debt service needs, it is far from clear that a court could properly determine that any part of the fund was not devoted to a public use. It would be difficult, at best, to draw a line between true debt service funds and overplus. It is of further interest to note that the claim of Bullis should have been paid from the bond proceeds, since his services were a project expense.

It is the general rule, in keeping with the view taken in the Bullis case, that, except as modified by positive law, current expenses of government come ahead of debt charges against available revenues and local discretion as to current expense items in the budget is not, absent bad faith or mistake, subject to judicial

control at the behest of creditors. The leading case is East St. Louis v. United States ex rel. Zebley, 110 U.S. 321, 4 S.Ct. 21 (1884). These propositions are particularly significant in a situation where there is a controlling tax limit or in a time of stringency where taxing power is not matched by actual ability to pay. A constitutional requirement that in authorizing public bonded indebtedness provision be made for levying and collecting annually by taxation an amount sufficient to pay interest and to provide a sinking fund for final redemption at maturity has in Ohio been interpreted to give bondholders a preference over current expenses as against available taxing power.

STATE ex rel. STAUSS v. COUNTY OF CUYAHOGA

Supreme Court of Ohio, 1935. 130 Ohio St. 64, 196 N.E. 890.

In the year 1935 the taxing authorities of Cuyahoga county omitted to levy a tax for the purpose of paying at maturity general bonds of the county in the total approximate amount of \$1,739,000, and maturing on April 1st, September 1st, September 15th and October 1st of that year, for the reason that same were to be refunded.

In the budget for the fiscal year 1935 filed by the county commissioners with the county auditor, provision was made for levying a tax for all debt service charges. After the county auditor had laid this budget before the budget commission of the county, the county commissioners, in a resolution reciting that by reason of the fact that no other method of payment of the maturing bonds existed they had determined to issue bonds to refund them, certified to the budget commission an amendment to the budget, in which they set up, as additional estimated resources applicable to the payment of debt service charges, the proceeds to be derived from the issuance and sale of such refunding bonds to be issued by the county. The budget commission then transferred the proposed levy in the amount of such refunding bonds from debt service levy to the general operating fund of the county, and issued its certificate of estimated resources to the county commissioners in accordance therewith.

On February 23, 1935, the county commissioners made application to the Bureau of Inspection and Supervision of Public Offices of the state of Ohio for approval of such refunding bond issues.

On February 25, 1935, the bureau made a finding based on such application that no other method existed for the payment of such bonds at maturity. It approved refunding bonds for the bonds

maturing on April 1st, but raised the question as to whether the bonds maturing on October 1st "are about to mature" as provided by statute.

Relator claims the declaration that it is necessary to refund, passed by the county commissioners, is a mere conclusion or opinion of that board, not based upon facts. That when the budget commission transferred \$1,739,000 from debt charges to operating expenses it stated that, based upon the 1934 expenditures of the county and considering all sources of revenue, there would be a deficit of only \$150,000 below the income of the fiscal year 1934 if such transfer were not made. That since that time the budget clerk submitted revised figures to the Cleveland Chamber of Commerce, showing such estimated deficit as \$300,000. That out of a total budget for all purposes of \$16,678,092.39, the budget commissioners transferred \$1,739,000 in order to take care of a deficit of from \$150,000 to \$300,000.

Relator further claims that no question of the county's statutory welfare is involved, since the electors of the county have authorized two levies of 3 mills, and 3.2 mills, respectively, to be levied outside the one per cent limitation; that no question of the city's operating levy is involved, since the electors have authorized an operating levy for the city to be levied outside the tax limitation; that no question of the school district's operating levy is involved, since the school district already has an operating levy voted outside the limitations and the major portion of the school district's bonds are also payable from taxes voted outside the limitations; that there is no question of a tax for bonds of the county issued in anticipation of the collection of special assessments, and that the bonds involved are those bonds payable only from taxation and for which no other sources of revenue are pledged.

Relator brings this original action in mandamus in this court to require the taxing authorities to amend the proceedings had by them so as to allocate to the payment of the bonds in question so much of the tax levied within the ten-mill limitation as is necessary therefor.

Answer was filed by the taxing authorities, joining issue with relator, in which answer respondents plead facts which they claim not only justify their action but defeat relator's plea for a writ of mandamus.

STEPHENSON, J. As we view it, the law of this case is largely determined by the answer to one question, namely: Does Section 11, Article XII of the Constitution of Ohio, as amended, effective January 1, 1913, deny to the County Commissioners of

Cuyahoga county the right to refund the county's bonded indebtedness?

Section 11 of Article XII of the Constitution of Ohio, as amended, effective January 1, 1913, reads as follows:

"No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity."

The relator herein is the holder in due course of Bond No. 8 in the denomination of \$1,000, dated August 1, 1930, bearing interest at the rate of four and one-quarter per cent per annum, payable semi-annually on April 1st and October 1st of each year, due as to principal on October 1, 1935, and of a series of the county's portion of Lee Road No. 12 improvement bonds, aggregating in principal amount \$18,000, and maturing in the years 1931 to 1940, inclusive.

There can be no question but that this bond is a serial bond for the retirement of which there was a constitutional requirement at the time of its issuance that the county should provide by proper legislation for levying and collecting annually by taxation an amount sufficient to pay the interest thereon as the same should accrue and provide a sinking fund for final redemption at maturity. This constitutional requirement was complied with at the proper time. Then the question asserts itself, has the holder of this bond such a vested right as entitles him to demand that the legislation be strictly followed? In other words, is his right of such gravity and sufficiently clear to entitle him to the extraordinary writ of mandamus to require the taxing authorities of Cuyahoga county to keep in step with their original legislation?

Let us not lose sight of the fact that this same constitutional requirement is made to apply to renewals of existing indebtedness by the same constitutional provision.

Pre-existing legislation can in no wise effect a change in a constitutional amendment, but it may furnish a worth-while side light in determining the scope of such constitutional provision.

We shall not attempt to quote or even refer to all the statutes existing prior to the adoption of the constitutional amendment in question, that gave power to taxing districts to renew and refund existing indebtedness. The words "renew" and "refund" as used in our tax laws are not strictly synonymous. These old statutes relative to municipal corporations were retained in form and substance until amended, effective in 1922, 109 Ohio Laws, 339, wherein the power to refund which could be exercised when

it appeared to the best interests of the corporation so to do was taken away. It was the part of wisdom to place this limitation on municipalities, as the old grant of power was altogether too liberal.

The legislative grant of power to taxing districts or subdivisions is contained in Section 2293-5, General Code:

"With the approval of the bureau of inspection and supervision of public offices, the taxing authority of any subdivision at any time prior to June 30, 1935, may refund any outstanding bonds of the subdivision which have matured or which are about to mature. The bureau shall approve such issue only when it finds and to the extent it finds that no other method of payment in whole or part exists; . . ."

Respondents seem to anticipate that relator would attack the right and power of the Bureau of Inspection and Supervision of Public Offices to approve this proposed renewal, or refunder, as you please, but we fail to find any such attack.

Relator defines his position most succinctly. He states, "The question to be determined by the Court does not depend upon the power of the County to issue refunding bonds, nor upon the meaning nor constitutionality of Section 2293–5, General Code. The question involves Section 5625–23, General Code, and Section 11 of Article XII of the Constitution. The specific question involved is whether these provisions of the Uniform Tax Levy Law and of the Constitution can be ignored by the Budget Commission."

We quote Section 5625–23, General Code, in full:

"The county auditor shall lay before the budget commission the annual tax budgets submitted to him under the provisions of this act, together with an estimate to be prepared by such auditor, of the amount of any state levy, the rate of any school tax levy as theretofore determined, and such other information as the budget commission may request or the state tax commission may prescribe. The budget commission shall examine such budget and ascertain the total amount proposed to be raised in the county for the purposes of each subdivision and other taxing units therein.

"The budget commission shall ascertain that the following levies are properly authorized and if so authorized, shall approve them without modification.

- "(a) All levies outside of the ten mill limitation.
- "(b) All levies for debt charges not provided for by levies outside of the ten mill limitation, including levies necessary to pay notes issued for emergency purposes.

"(c) The levies prescribed by sections 4605 and 4621 of the General Code.

"If any debt charge is omitted from the budget, the budget commission shall include it therein."

There can be no question that the language of this statute is mandatory, but if these statutes are to be construed as contended by relator, are we not running into a statutory conflict?

Can Section 2293–5, General Code, and Section 5625–23, General Code, be reconciled with each other and with Section 11 of Article XII of the Constitution of Ohio? If they can not, we must find wherein the supremacy lies.

Relator raises no question concerning the imminence of the maturity of the bond in question. He contents himself with the assertion that such question is not in the case.

If Section 5625–23, General Code, is absolute, relator is right in his contention. If Section 2293–5, General Code, has any virtue at all, then relator is wrong, as he has not shown a clear legal right to his writ.

Section 2293–5, General Code, became effective in its present form September 5, 1933, and Section 5625–23, General Code, became effective June 29, 1934. If these statutes were clearly repugnant, then Section 5625–23, General Code, being the last expression of the General Assembly, would have the right of way. Are they repugnant?

It is the duty of this court to reconcile these statutes, if possible.

Statutes in pari materia are to be construed together as having one object and one system and policy. This has been the law since 1840 and has at no time been departed from. Dodge v. Gridley, 10 Ohio 173.

The sections of the Code involved herein deal with the general subject of taxation. Section 2293–5, General Code, deals with the refunding of bonds specifically. Section 5625–23, General Code, provides for the preparation of the annual budget, the approval of levies and the exercise of a sort of supervisory power over debt charges. This supervisory power is contained in the last sentence of Section 5625–23, General Code, namely:

"If any debt charge is omitted from the budget, the budget commission shall include it therein," and this is the peg upon which relator hangs his hat.

If relator's contention along this line is sound, then the bonds in question cannot be refunded, Section 11 of Article XII of the Constitution of Ohio and Section 2293–5, General Code, to the contrary notwithstanding.

Counsel cite Rabe v. Board of Edn. of Canton School Dist., 88 Ohio St. 403, 104 N.E. 537, in support of their contention that Section 11, Article XII of the Constitution, is mandatory in requiring the levy of an annual tax to take care of debt charges and that such tax was a preferred tax over the tax for operating expenses of the subdivision. The right of a subdivision to refund its bonded indebtedness was not involved. The question in that case was the proposed issuance of bonds in excess of anticipated income, necessitating a rate in excess of the constitutional limitation. The dictum of Judge Donahue, at pages 422 and 423, does support relator's contention herein. . . .

Relator with consistent sagacity adheres in thought, if not in language, to the word "incurred" as used in Section 11 of Article XII of the Constitution, but remains studiously away from the term "renewed," as expressed therein. We may argue away from and around it, but, like Banquo's ghost, "It will not down"—it is there.

If our Constitution makers did not intend that the state and its political subdivisions could renew their obligations and refund their indebtedness, why use the term at all? The Constitution is surely as much a part of the law of Ohio as its statutes, and purchasers of bonds are charged with knowledge of its provisions. They are bound to know that the word "renewed" as well as the word "incurred" is used in this section in relation to the indebtedness of the state and its political subdivisions. They run along hand in hand, and neither is dignified above the other. On the contrary, the legislative requirements are the same. If the state and its political subdivisions cannot renew indebtedness, they cannot incur it, as the power to do both comes from the same constitutional grant.

The state and its political subdivisions under the law can have but three forms of negotiable indebtedness, namely, bonds, certificates of indebtedness and notes. A certificate of indebtedness is an emergency obligation, issued only for limited purposes, and from its very nature is not renewable. Notes may be issued, but not for a longer period than six months. They are issued in anticipation of the taxes collected and distributed at the next semi-annual settlement thereafter, and the money realized therefrom can only be used for the purposes for which the tax when collected could be used. As certificates of indebtedness and notes are not renewable, then the only form of indebtedness that can be renewed is bonded indebtedness, and the Constitution so states.

We grant that the last sentence of Section 5625-23, General Code, "If any debt charge is omitted from the budget, the budget

commission shall include it therein" is specific and mandatory. But the law does not require administrative boards to do vain things.

The budget commission consists of the auditor, treasurer and prosecuting attorney of the county, and it surely knows when the county is going to refund bonded indebtedness and, everything else being equal, it would be nonsense to include in the budget a charge for a debt that was to be refunded during that year.

Relator probably has some trepidation lest the refunding bonds cannot be sold. We fail to see wherein relator would be seriously hurt in such event. He would still have his bond, to the payment of which the full faith, credit and property of the county is pledged. The state and its subdivisions cannot run willy nilly in the refunding process. The Bureau of Inspection and Supervision of Public Offices has complete supervision over such process. On February 25, 1935, this bureau approved the proposition to refund the bonds of Cuyahoga county maturing April 1, 1935, but withheld its approval as to bonds maturing October 1, 1935, because of doubt as to legal applicability of the words "about to mature," as used in Section 2293–5, General Code.

Ohio's fiscal year is the same as its calendar year. Both begin January 1st and end December 31st of each year. Section 260–1, General Code.

Surely any bond that is to mature during any particular fiscal year is "about to mature" at any time after January 1st of that year. In view of the fact that we have a fiscal year provided by statute and provided for the purpose of taking care of, adjusting, and, in so far as is possible, conserving the finances of the state and its subdivisions, any other holding, it would seem, would be farcical.

Just how far must county commissioners go when they seek to refund bonded indebtedness?

The state has said in effect, "You can refund such indebtedness prior to June 30, 1935, if your proposition is approved by the Bureau of Inspection and Supervision of Public Offices." The bureau is restricted, of course, to the extent that it shall approve such issue only when it finds and to the extent that it finds that no other method in whole or in part exists. After this approval has been secured, it is not for the budget commissioners to question the righteousness, wisdom or legality of this approval, as the bureau is a state institution—and the county commissioners have the right to proceed upon such approval.

We are in perfect accord with the law as announced in the Rabe case, supra, which case has been followed consistently by this court, to the extent that Section 11, Article XII of the Constitution of Ohio, is mandatory in requiring the levy of an annual tax to take care of debt charges and that such tax is preferred over a tax for operating expenses, that such preference is eternal and everlasting under any and all circumstances, except when the taxing authority of the state or its subdivisions undertakes to refund existing indebtedness, in which event no levy need be made to take care of the bonds already matured or about to mature that are to be refunded.

Relator fails to present a clear right to a writ of mandamus herein and the same is denied.

Writ denied.

The problem in the Stauss case can be formulated in this way: Does the constitutional provision as to debt service levies grant power to refund or is it a limitation to which such refunding power as the state might otherwise devolve on local government would be subject? The court did not appear to appreciate this distinction.

A collateral point of much interest should be noted. What the court approved in the Stauss case was a device by which the refunding of current bond maturities freed, to that extent, current debt service levies within the governing tax limitation and permitted diversion of the proceeds to the county's general fund. To this extent the preference given debt service over operating expenses is broken down.

SECTION 2. MANDAMUS AND MANDATORY INJUNCTION

The most effective remedy of the creditor of local government has long been the writ of mandamus. The office of this prerogative writ is to compel the performance of a public duty. Generally speaking, apart from local variations, the writ is not available if there is another legal remedy which is adequate. This is usually no obstacle as to an established claim since execution and garnishment would be unavailing. The writ, moreover, has lost much of its prerogative character. It has been commonly issued in behalf of creditors of local government as if available as of right. In some states this has been achieved by statute.

Where mandamus is sought in order to enforce payment of a money demand it is necessary that the claim be liquidated. Liquidation may be effected by judgment, by statute fixing the amount of an obligation, or by action of the parties. A municipal bond is a liquidated obligation and it is not necessary in the state courts that it be reduced to judgment.

Under conventional theory the duty must be one imposed by law as distinguished from contracts. Revenue bond issues may involve contractual duties not specifically grounded upon statute. It is not considered likely that this will be a serious obstacle to the bondholders. See Commercial National Bank v. Robinson, 66 Okla. 235, 168 Pac. 810 (1917).

It is elementary that the duty to act must be mandatory. If the public officer or body has a discretion which he or it is bound by law to exercise, mandamus is available to compel action but not the manner of exercise of the discretion. Thus, in the matter of audit and allowance of claims by public officers, the cognizant officers can be compelled to take jurisdiction but their judgment may not be controlled, at least as to questions of fact. Official action at various stages in the process of payment is ministerial and mandamus is in reach to cause the specific act, such as the issuance of a check or warrant, to be done. For an analysis of the cases see the writer's paper "Methods of Enforcing Satisfaction of the Obligations of Public Corporations" 33 Col.L.Rev. 28, 32 et seq.

Ordinarily mandamus will not lie to compel the performance of a duty until there has been a default in its performance. Suppose, however, that there is a compelling basis in fact for concluding that a default is impending, as where a city is already in default on some of its bonds, has prepared a budget making no provision for debt service taxes, has not prepared a tax assessment roll and is under the administration of officials who avow that no current property tax would be levied. The Supreme Court of Florida has taken the position that under such circumstances bondholders may seek mandamus to compel a debt service tax levy and timely performance of the requisite preliminary steps. State ex rel. Harrington v. City of Daytona Beach, 118 Fla. 773, 160 So. 501 (1935).

There are instances in which the issuance of bonds to provide funds to pay debts has been enforced by mandamus. Jackson v. Madison County, 175 Ark. 826, 300 S.W. 924 (1927); State ex rel. Skyllingstad v. Gunn, 92 Minn. 436, 100 N.W. 97 (1904); State ex rel. Turner v. Village of Bremen, 117 Ohio St. 186, 158 N.E. 6 (1927). It is doubtful that this recourse has large significance. Issuing bonds to pay floating debt involves funding, not discharge. Local credit could be seriously affected, moreover, were a unit forced to issue bonds without regard to market con-

ditions or outstanding funded debt. The situation bespeaks local discretion unless foreclosed by clear statutory mandate.

Where mandamus, a legal process, is available there is ordinarily no basis for resort to mandatory injunction to compel official action relative to satisfaction of claims. Tyler County v. Town, 23 F.2d 371 (C.C.A. 5th, 1928). And see George v. City of Asheville, 80 F.2d 50, 57 (C.C.A. 4th, 1935). But see Board of Education of Town of Carmen v. James, 49 F.2d 91 (C.C.A. 10th, 1931). In the revenue bond situation, however, the mandatory injunction has several advantages over mandamus. The remedy does not depend upon a statutory duty. As a matter of fact, it would be available under the broad language of many revenue bond enabling acts to the effect that the rights of bondholders may be enforced by mandamus or other appropriate suit, action or proceeding at law or in equity. The mandatory injunction may be coupled with other redress such as an accounting and operating receivership.

SECTION 3. PROHIBITORY INJUNCTION

This is a valuable remedy for both general obligation and special obligation creditors, but is of peculiar importance to the latter. A general obligation creditor may seek to restrain diversion of funds which have been dedicated to or appropriated for the payment of claims of his class. Tyler County v. Town, 23 F.2d 371 (C.C.A. 5th, 1928). Holders of revenue bonds, or a trustee acting for them, may find occasion to curb action by the debtor which would damage the revenue-producing facilities or interfere with the stipulated flow of funds. An injunction is the obvious recourse to prevent violation of negative covenants supporting revenue bonds. It is unlikely, even apart from the express remedial provisions of revenue bond enabling statutes, that access to equity will be denied. See George v. City of Asheville, 80 F.2d 50 (C.C.A. 4th, 1935) (general obligation bonds additionally secured by utility revenues).

SECTION 4. ACCOUNTING

GETZ v. CITY OF HARVEY

Circuit Court of Appeals of the United States, Seventh Circuit, 1941. 118 F.2d 817, certiorari denied 314 U.S. 628, 62 S.Ct. 59.

LINDLEY, DISTRICT JUDGE. In 7411, the plaintiff and, in 7481, the defendant, City of Harvey, appeal from a judgment rendered

in an action wherein plaintiff, claiming to be the owner of water fund certificates issued by the City of Harvey, a municipal corporation, in the face amount of \$243,000, sought an accounting for diversion and misapplication of funds applicable to the certificates, an injunction restraining defendant from further depletion of such funds and restoration of all illegally diverted. Answering defendants denied validity of the certificates and asserted in the alternative that, if valid, they should be held subject to a trust in their behalf by virtue whereof the city had the right to compel surrender of plaintiff's certificates upon payment of what the brokerage firms of A. C. Allyn & Company and Stifel, Nicolaus & Company had paid for them, namely, 70 cents on the This purchase had been made, as defendants claimed, in pursuance of a contract with the city, whereby A. C. Allyn & Company was bound to deliver such certificates as it might purchase to the city at the price at which it might acquire them. Defendants averred further in this connection that the certificates are not, under the laws of Illinois. negotiable instruments and that plaintiff, a subsequent purchaser, was bound to take notice of the alleged rights of the city. Plaintiff, in his reply, denied knowledge of any alleged conspiracy or implied trust and asserted that the bonds had been purchased by his immediate assignor at 100 per cent of their par value and that he, as a bona fide purchaser, had succeeded to all the right and title therein and thereto, subject to no defense. He replied also that the certificates had been issued properly and constituted binding obligations according to their terms and provisions.

Upon hearing the report of the master, to whom the cause had been referred, the District Court on May 23, 1940, entered judgment, directing that plaintiff deposit, within thirty days, certificates of the par value of \$243,000, with the clerk, and that the city deposit, also within thirty days, the sum of \$173,300 the amount actually expended by Allyn & Company and its associates in the purchase of these certificates and sufficient funds to satisfy the interest upon this purchase price, the aggregate amount being \$203,795.19, for the use and benefit of plaintiff. The court further ordered that if the city should fail to comply, judgment be entered against it in favor of plaintiff for the latter sum.

From this judgment plaintiff appeals, insisting that the proof shows that defendants were guilty of wrongfully depleting the assets of the water department in the sum of \$343,523.07 and of diverting moneys from that department in the amount of \$146,973.31; that it was the city's duty as trustee to distribute promptly the funds, as collected, to the certificate holders; that the alleged contract between the city and one O'Brien, agent, as defendants claim, for Allyn & Company, for refunding these and

other certificates, was unauthorized and illegal; that the city had no right to purchase certificates in the market; that the court wrongfully ordered plaintiff to surrender his certificates upon payment of 70 per cent of their face value plus interest; that any equities arising out of contracts of the city with O'Brien or Allyn & Company, being unknown to plaintiff, affect in no way his rights; that the alleged contract for refunding never became effective; that if the certificates were improperly issued, the city is estopped to complain, and that the court erred in failing to direct restorement of the diverted funds and payment of plaintiff, according to his statutory rights and priorities, and in various other respects.

In 7481 the city appeals, averring that the city was without legislative power to issue the certificates involved and is not estopped to assert this defense. The questions presented upon the two appeals will be disposed of in one opinion.

It is important, first, to ascertain plaintiff's rights and the effect of the alleged equities of the city against him. In 1924 the city purchased the then existing water plant from the Public Service Company of Northern Illinois for the sum of \$200,000 and provided for payment of the same by issuance of certificates in an equivalent amount, bearing interest at the rate of 5 per cent, maturing over the period from September 15, 1925 to September 15, 1944, secured by a mortgage upon the system and payable out of the water funds collected by the city.

In September, 1926, the city, finding the existing system inadequate, enacted an ordinance approving plans and specifications for an extension or enlargement to be known as System No. 2, and on January 31, 1927, passed another ordinance authorizing issuance of water fund certificates in the amount of \$350,000, bearing interest at the rate of $5\frac{1}{2}$ per cent, payable over a period of years beginning August 1, 1927, out of water funds and secured by a mortgage upon the extension. Each mortgage was executed as provided in the respective ordinances.

On April 20, 1936, one O'Brien, a broker in municipal securities, proposed to the city that, inasmuch as principal and interest of approximately \$100,000 upon water certificates were past due and refunding was desirable, he would (1), "lend" his "best efforts toward refinancing" all certificates of each issue outstanding, thereby placing "the water department on a sound financial basis"; (2) pay all costs incidental to securing deposit of outstanding certificates, and (3) "purchase at par and accrued interest the new bonds (certificates) issued, to bear interest at the rate of 4¾ per cent" and for such services charge 5 per cent of the par value of the new certificates. This proposal purported to

be accepted in behalf of the city on April 21, 1936, by the Mavor. the Commissioner of Finance and the Commissioner of Public Property, the municipality being under the commission form of government. Apparently the negotiations progressed no further until September 8, 1936, when O'Brien further proposed that, in view of the total indebtedness of the water department of \$464,-000, he would deliver to the city for cancellation \$464,000 par value of outstanding certificates and procure cancellation of interest in addition thereto. For doing this, he proposed that the city deliver to him \$452,000 par value legally issued refunding certificates bearing interest at 4 per cent. The difference of \$12,-000 represented certificates then held by the city. The municipality was to adopt an ordinance necessary to effectuate the refunding to the satisfaction of O'Brien's attorney and to enact such other ordinances as his attorney might deem desirable "to provide additional security." The amount of certificates maturing each year was to be agreed upon by the city and himself. The final paragraph of his proposal recited that the agreement was "dependent upon my ability to deliver the above described water revenue certificates under the conditions and terms set forth." An acceptance in behalf of the city was signed September 8, 1936, by the Mayor and the Chairman of the Finance Committee.

After April 20, 1936, O'Brien, acting for himself or Allyn & Company, who furnished the money, purchased \$211,000 par value certificates of the 5½ per cent issue at the rate of 70 cents on the dollar. Some \$30,000 in addition were purchased in the same manner from other bondholders at various prices. The proposal dated September 8, 1936, which was to expire in 90 days, was never formally renewed. O'Brien testified that in the purchase of the certificates he acted as an independent broker and eventually found himself unable to purchase the remainder of the outstanding certificates and never got in position to deliver them to the city; that he was able to procure certificates aggregating only \$243,000, and that he did not and could not complete his proposal because it was impossible to procure the other outstanding certificates. He testified also that the city never tendered him any refunding certificates. After it became apparent that O'Brien's undertaking could not be completed, the city employed another brokerage company in an attempt to effectuate refunding.

There were various trades in the securities among Allyn & Company, Stifel, Nicolaus & Company and others between October 15, 1936 and November 15, 1937, at prices ranging from 70 cents to par. Eventually on August 18, 1937, Stifel, Nicolaus & Company sold to one Mott in Detroit, Michigan, \$222,000 and on November 17, 1937, \$21,000 in certificates, all at par. Mott

paid cash and entered into no arrangement for repurchase by the seller. The securities were sold to him without recourse and for cash. Thereafter Mott sold them to plaintiff at par. Plaintiff executed his note for the full amount and deposited the certificates as collateral security for its payment.

We are first confronted with the question of whether plaintiff, in the situation he finds himself, is bound by any alleged latent equity in the favor of the city as against O'Brien and Allyn & Company. The master found, and the court agreed that plaintiff stood in the shoes of Allyn & Company. But the evidence discloses that plaintiff is a purchaser for value and had no knowledge of any dealings between the city and O'Brien or Allyn & Company.

Under the Illinois law, the certificates, being payable solely from the water fund, are not negotiable instruments within the meaning of the law. Northern Trust Company v. Village of Wilmette, 220 Ill. 417, 77 N.E. 169, 5 Ann.Cas. 193; Morrison v. Austin State Bank, 213 Ill. 472, 72 N.E. 1109, 104 Am.St.Rep. 225; First National Bank v. City of Elgin, 136 Ill.App. 453, 463. Under these authorities, a bona fide purchaser of certificates in good faith holds them subject to "defenses available between the original parties." He stands "merely in the shoes of the original payee." From this defendants argued, and the court found, that plaintiff held the certificates subject to any latent defense in favor of the city against Allyn & Company. But the doctrine does not go so far. It is not insisted here that there was any defense to the certificates in favor of the city as against the original payee but it is asserted that a defense has come into existence subsequent to the original issue by virtue of transactions between the city and Allyn & Company. Even strictly non-negotiable paper passes free of latent defenses, except those existing against the original contractor, to any bona fide purchaser except one who takes from a thief or a finder. The certificates possess all the qualities of negotiable papers except one, namely, that they are open to any defenses which might have been made to the consideration upon which they were originally founded. For all purposes involving title, they are negotiable. The cases relied upon by defendants do not militate against this doctrine. They merely hold that if warrants covering a special improvement are issued to a contractor and illegality or fraud occurs in performance of the contract, any purchaser of the warrants takes them subject to such defect and may not recover except subject to such defenses. Northern Trust Co. v. Wilmette. 220 Ill. 417, 77 N.E. 169, 5 Ann.Cas. 193. Here the doctrine of other Illinois cases controls. Thus in Silverman v. Bullock et al., 98 Ill. 11, the court said: "Persons dealing in such securities can.

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without difficulty, inquire of the makers if any defences exist against them, but more than that it is not practicable to do. Of course, it would not be possible to discover, even by the utmost diligence, all persons that might have equitable rights in the subject matter of the assignment, and the adoption of a rule that would let in latent equities to prevail against the assignee, would be to ensnare dealers in such securities."

The rule is the same as that governing assignment of a chose in action, namely, that one takes it subject to any defenses which might have been made to the claim upon which it is founded. Freiner v. Lane, 302 Ill.App. 248, 23 N.E.2d 750. city recognized this rule when it executed the mortgage appears from the language of the latter as follows: "* * anv purchaser before maturity of the certificates, whenever unregistered, or of the coupons, shall not be required to inquire into the title of the respective holders thereof, or to take any notice of any trust relating thereto, or, except by express notice thereof, be affected by the right, title or claim of any other person thereto, it being the intention hereof that the purchaser in good faith for value and before maturity of the certificates, whenever unregistered, or of the coupons, shall not be affected (unless he shall have actual knowledge thereof or unless the same be set forth in the certificates or coupons of this mortgage deed of trust) by any notice, facts or things that may at any time affect the relations between the City and pay prior holders or owners of said certificates or coupons."

The title of plaintiff as a bona fide purchaser for value of non-negotiable certificates without notice of defense, like that of an assignee of a chose in action, is in no wise affected by any latent equity arising, not out of the consideration upon which the certificates were issued but out of unknown dealings between the issuer and an intermediate holder in plaintiff's chain of title.

Even were plaintiff bound by the so-called proposal and negotiations between O'Brien and Allyn & Company on the one hand and the city on the other, upon analysis of those transactions, it is apparent that no equity arises in favor of the city. The first proposal, that of April 20, 1936, was not one which bound O'Brien to do anything other than "to lend his best efforts toward refinancing the obligations outstanding." The second was expressly subject to and "dependent" upon his ability to purchase and deliver the outstanding securities in exchange for the refunding certificates. The evidence is undisputed that he was never able to comply; that he found it impossible to procure all of the outstanding certificates and so notified the city. Neither proposal required him to deliver to the city anything less than the entire outstanding lot of certificates, and he was

bound to do that only if he were able to procure all of them. When this condition, upon which existence of a binding contract depended, remained unsatisfied, all obligations of the city to him and of him to the city were at an end. Such certificates as he and his associate, Allyn & Company, had been able to procure, they had purchased in the open market without any promise, express or implied, to resell them to the city, even if the latter could legally purchase the same. Had Allyn & Company purchased them at \$150 the loss would have been that firm's, not the city's; it alone took the chances of ownership, of gain or loss, when it purchased the certificates. Parties are not endowed with right of action for breach of contract, or to have the court declare a trust, by virtue of conditional contracts which, because of failure of prescribed conditions, never come into effective legal existence. There is no evidence, therefore, justifying the conclusion that Allyn & Company or O'Brien, failing in their efforts to purchase all of the outstanding warrants, owed any duty of any character to plaintiff with regard to certificates they had purchased with their own means. Plaintiff is the bona fide holder of certificates entitled to enforce his remedies with respect to the principal and interest payable thereunder.

We are faced, however, with the question of fact as to whether there have been improper diversions of funds properly applicable to the certificates held by plaintiff and others. Under the statutes of Illinois, the city, in collecting water funds and applying them to the discharge of certificates, is a trustee and if as such fiduciary it diverts or misappropriates trust funds, the holders of certificates are entitled to complain of the action and recover a judgment at law against the officials guilty of diversion or misappropriation. Rothschild v. Village of Calumet Park, 7 Cir., 350 Ill. 330, 183 N.E. 337; City of Jacksonville v. Bankers Life Company, 90 F.2d 141; People ex rel. v. Village of Bradley, 367 Ill. 301, 11 N.E.2d 415. The holders have the further right to a judgment requiring payment of matured certificates in their proper statutory order and calling for restoration of funds to meet payment of matured and unmatured certificates. City of Jacksonville v. Bankers Life Company, 7 Cir., 90 F.2d 141. Consequently, if the evidence shows that funds were disbursed illegally by the corporate authorities, the latter are personally liable therefor; their wrongful acts cannot be ratified or legalized by the city council and they may be compelled to restore the funds to their proper place in the city treasury.

In his final report, the master found that the city had sought to circumvent the principal and interest on the certificates purchased by Allyn & Company by commingling, juggling and otherwise diverting the water funds. "Viewed in the most charitable light," said he, "such conduct on the part of such officials in handling such funds amounts to at least gross carelessness on their part." But this fact he held immaterial because he erroneously concluded that the city had a latent partial defense growing out of its transactions with Allyn & Company, subject to which plaintiff took his certificates. Consequently he made no formal finding as to amounts or circumstances abiding in the diversion and misappropriation.

However, the evidence discloses without any controversy that between September 15, 1925 and April 30, 1939, the water funds collected by the city were more than sufficient to have retired all maturing certificates and all maturing interest. Instead of making proper application, however, the city failed to pay upon matured principal \$82,000 and upon matured interest \$111,550, a total of \$193,550. These facts, of themselves, were sufficient prima facie evidence, unexplained, to show diversion or misappropriation of water funds to the extent of \$193,550. At the time he began suit plaintiff held matured certificates of \$20,000, upon which the accrued interest was \$2,365 and matured coupons on other certificates amounting to \$84,507.50, a total of \$106,872.50, all payable out of water funds which had been collected but for which the city had failed to account.

The diversions were of various characters. The ordinance provided that the city should pay hydrant rentals of \$35 per annum for each of 786 hydrants. The aggregate amount due from the city annually therefor was \$27,510 and the total amount maturing from 1932 to 1939 was \$220,080. However, the city failed to appropriate sufficient funds. In 1932, \$15,000 was appropriated and levied; in 1933, \$10,000; in 1934, \$10,000 and in 1935, \$10,000. Thereafter no appropriations were made. The total amount appropriated for hydrant rental was \$45,000. Consequently the city has failed to appropriate \$175,080 due for water rental under its own ordinance. In addition hydrant rentals of \$22,911.33 collected from 1932 to 1934 have not been paid to the water department. Here was clearly a shortage of \$175,080, which in good faith, under its ordinance, the city was bound to appropriate for the purpose of realizing funds with which to retire the certificates.

On April 30, 1931, the city owed the water department \$7,599.99 in one sum and \$91,809.38 in another. These were part of municipal indebtedness aggregating \$199,358.32. On November 30, 1931, the council passed an ordinance authorizing borrowing \$200,000 upon general corporate bonds and providing for their payment by levy and collection of a direct annual tax. The bonds were issued and the city delivered to the water fund 95 bonds of \$1,000 each in satisfaction of the hydrant rentals

accruing prior to November 30, 1932, in the amount of \$97,485. 81. Bloom, commissioner at the head of the water department, then delivered the bonds to the city treasurer. 38 of these bonds were subsequently sold to discharge special assessments charged to the water department. The remaining 57, aggregating \$57,-000, remained in the custody of the treasurer until April 30, 1939, when they were cancelled, at the direction of the commissioner of finance. While the bonds were outstanding, the city treasurer collected \$107,278.07 in taxes applicable to the total issue of \$200,000. Out of this the treasurer paid \$15,000 on the principal sum of the bonds and \$57,510 on accrued interest. Obviously the remainder of the tax collections, namely, \$34,-768.07 should have been applied toward the retirement of bonds and interest. Yet none of this money has been paid to the water department, although the bonds were delivered to that department to pay for the hydrant rental. Clearly this was a diversion of funds, wholly unexplained by defendants.

On January 4, 1937, the city received from the Village of Dixmoor a check for \$10,000 in payment of water purchased from the city of Harvey. This was converted into a certificate of deposit which was retained by the city. On June 7, 1937, the credit was converted into a cashier's check delivered to the Mayor, who thereupon purchased \$10,000 in water fund certificates of the same character as those held by plaintiff for \$10,000. These bonds apparently were held by the Village of Dixmoor. The \$10,000 thus expended should have been deposited in the water fund and distributed in due course to certificate holders in accord with the city's statutory duties.

On June 24, 1937, the city purchased water fund certificates at par in the sum of \$5,000 from Mr. Dowdle. On the same date it received from the Village of Markham for water delivered \$15,085.98 and out of this, certificates were purchased at par to the extent of \$12,820. The balance, on deposit in a special fund, was \$2,265.98. This total sum of \$15,085.98 should have been delivered to the water fund.

On December 6, 1938, the city purchased with water funds, \$5,000 in certificates at par. The Village of Phoenix on May 3, 1937, paid \$15,000 due the city for water by certificates at par. The Ingalls-Shepard Company similarly paid its water rental to the extent of \$10,000 in water certificates. 79 other certificates were purchased by the city from various individuals, only nine of which had matured at the time of the accounting and the next of which matures February 1, 1942. On June 20, 1939, the city purchased certificates from the R.F.C. for \$22,000. All these purchases were made without authority of ordinance or

resolution and in the very teeth of the existing ordinances and statutes, which prescribe that water funds shall remain inviolate for the payment of certificates and that the latter shall be paid in a certain specified order.

The city, by virtue of an enacted ordinance. issued scrip in payment of moneys due and the water department accepted it in payment of water bills to the extent of \$18,036. On June 25, 1939, there was on hand, scrip, counted as cash, of \$20,000. The city accepted in payment of water accounts, wage assignments amounting to \$5,956.69. It paid, from water funds, to the First National Bank of Blue Island, for commissions due it in making sales of \$38,000 of the general corporate bonds, \$2,910. It charged off as worthless water rentals aggregating \$56,017.-15 as bad debts and other water rentals in the sum of \$11,818.-51. It paid from water funds to attorneys and auditors \$17,012.-50, for general bond expenses \$4,461.07, and in settlement of a judgment against the city, \$300. No ordinance authorized any of these acts, other than issuance of scrip.

The city in 1938 issued general refunding bonds in payment of claims against it amounting to \$129,000. \$88,000 of these bonds were delivered to one Hoffman as trustee to secure various claims against the city, included in which was \$33,172.33 due the water department. The water department in due course received \$22,235, incurring a loss of \$10,937.33, consisting of \$7,000 in bonds which Hoffman surrendered and a charge made against the department of 15 per cent for collection. The surrender of \$7,000 in bonds was unjustified and unauthorized but done at the city's request. Nor is there any evidence justifying the collection charge.

There was a prima facie case of depletions of water funds as follows: Fire hydrant rentals, \$175,085; cancellation of general bonds belonging to the water fund, \$57,000; unauthorized expenditures from the fund, \$24,673.57; unauthorized charge-offs credited to the city, \$56,017.15; other unauthorized expenditures from water funds, \$19,815,102; loss of the water department arising from improper cancellation of \$7,000 in bonds and unjustified charge of commission for collection, \$10,937.33, and of diversions of funds as follows: Tax moneys collected for hydrant rental but never paid into the fund, \$22,911.33; tax moneys collected for retirement of interest upon general bonds held by the water department, \$23,940; unauthorized use of water funds expended in improper purchases of certificates, \$79,820; moneys on hand collected from the Village of Markham for water. \$2.265.98; illegal scrip held and treated as cash, \$18,036. Prima facie then the city depleted the water funds and diverted them to the extent of \$490,496.38.

When plaintiff showed that the city had collected the money applicable to the payment of the certificates and had not applied it, he had met the burden imposed upon him and was entitled to judgment, in the absence of valid defense. Rothschild v. Calumet Park, 350 Ill. 330, 183 N.E. 337. The Illinois law does not countenance evasion by a municipality of its debt or its duty as a trustee by wilful or negligent failure to apply toward the discharge of obligations funds collected by it for the specific purpose of meeting such demands. People v. Village of Bradley, 367 Ill. 301, 11 N.E.2d 415; Allbee v. Aurora, 306 Ill.App. 457, 28 N.E. 2d 742.

We find in the record no defense meeting in any way the case made out by plaintiff. The \$57,000 in general bonds had by proper corporate action been allotted to the water fund. They could not thereafter be taken from that fund. Where the city council has formally voted upon a proposition and there is no motion for reconsideration, it may not reconsider its action where the rights of other persons intervene. Kankakee v. Small, 317 Ill. 55, 147 N.E. 404. As the moneys or securities were to be applied toward the payment of outstanding obligations payable out of the fund, plaintiff's right therein became vested and no subsequent act of the municipality might deprive him of such right. The city was charged by law to accede to the faithful application of the bonds. Town of Aurora v. Chicago, B. & Q. R. R. Co., 119 Ill. 246, 10 N.E. 27; Peoria & Pekin Union Ry. Co. v. People, 144 Ill. 458, 33 N.E. 873.

The scrip issued by the city was attempted to be justified by an ordinance authorizing it but that the same was wholly improper appears from Hewitt v. Board of Education of Normal School District, 94 Ill. 528, where it is said that municipalities, in the absence of endowment of power so to do in their charters, have no authority under any circumstances to make and place on the market such paper. People ex rel. Hurd v. Johnson, 100 Ill. 537, 39 Am.Rep. 63; Coquard v. Oquawka, 192 Ill. 355, 61 N. E. 660; Thomas v. Richmond, 12 Wall. 349, 79 U.S. 349, 20 L.Ed. 453.

Nor, under the same authorities, was there legal right to accept wage assignments in payment of water bills. Furthermore the various payments made to individuals or others from water or other funds without appropriations or otherwise were in violation of the Illinois laws. Where no appropriation is made for work in excess of the statutory amount, it is impossible for any act of the city officials to create a liability. The taxpayers have a right to see that public money is properly appropriated, and of this right they cannot be deprived. May v. City of Chicago, 222 Ill.

595, 78 N.E. 912; Gathemann v. City of Chicago, 263 Ill. 292, 104 N.E. 1085; Siegel v. City of Belleville, 349 Ill. 240, 181 N.E. 687; People v. Hummel, 215 Ill. 71, 74 N.E. 78. Nor could the city rightly compromise the claims it held against other municipalities for water funds for less than their full amounts. People v. Holten, 287 Ill. 225, 122 N.E. 540; People v. Parker, 231 Ill. 478, 83 N.E. 282.

It is apparent that the various depletions and diversions proved by plaintiff are without defense and he is entitled to a decree restoring the funds to the water department and their application made to the payment of his matured principal and interest in accord with his rights under the statutes of the State of Illinois, due regard being had to the rights of other holders.

In 7481 defendant appeals from the judgment in so far as the court refused to hold that the city was without legislative power to issue the warrants or to create two special water funds and in so far as the court held the city estopped to deny validity of the certificates contending that, under the act of July 1, 1899, Laws 1899, p. 104, Smith-Hurd Stats.Ill. c. 24, § 440 et seq., the city exhausted all of its power to issue certificates when it enacted its original ordinance for the purchase of plant No. 1 and issued certificates for the cost thereof.

The title of the act embraces the idea of grant of authority to cities to build or "extend" waterworks "systems" for public and domestic use and provide for the cost thereof. Section (1) authorizes a city to acquire waterworks by building or purchasing a waterworks system or by enlarging or extending an existing system and to issue certificates for indebtedness to cover the cost of such purchase or enlargement at par in payment for the construction, erection, purchase or extension. Under Section (3) the entire proceeds realized from the operation of the waterworks system are to be paid into a special fund known as the water fund.

By ordinance, duly adopted on August 4, 1924, the city authorized purchase of the water distribution system then existing in Harvey and then operated by the public service company by paying therefor \$200,000 in certificates secured by a mortgage upon the works and payable out of its earnings. This plant is designated in the record as System No. 1. On September 20, 1926, the city adopted an ordinance approving plans for construction of an enlargement or extension of the old system, to be designated as System No. 2. The ordinance recited that it was adopted in pursuance of the act of 1899 and other acts of the State of Illinois pertinent to the subject matter and that, in pursuance of the provisions of these statutes, the city had de-

termined to cause to be constructed and acquired an "extension of its water distribution system." Later the city passed an ordinance authorizing issuance of water fund certificates of \$350,000 in payment of the cost of the extension. This ordinance recited that the existing system was "wholly inadequate in its capacity to serve the necessities of the city" and provided that the moneys received from each system should be allocated to fund No. 1 and fund No. 2 in the same proportions as the amount of water pumped through System No. 1 compared with the water pumped through System No. 2, as shown by intake meters to be maintained for each system. It was further directed that the moneys deposited in fund 2 should remain forever "inviolate for the payment of the cost of operation and maintenance and of the principal and interest of certificates of System No. 2 and for no other purpose." A similar provision was made with regard to the funds for System No. 1, it being especially provided that no part of the same should be considered pledged for payment of certificates of System No. 2 therefrom. The mortgage, executed pursuant to the ordinance, contained a similar recital.

It appears, however, that the city never installed intake meters for either system and apparently all water funds were kept in one fund. Plaintiff, through the testimony of a public accountant, made an allocation, however, of the earnings of the two systems by comparing the earnings prior to the creation of the extension and those thereafter. In the two years when System No. 1 operated alone, its average net earnings were \$26,591.71 annually. Using this as a basis, in comparison with the earnings thereafter, the accountant found that the total net profits from the water company from 1924 to 1938 were \$744,633.84; that these should be thus allocated: to System No. 1, \$388,901.77, to System No. 2, \$355,732.07. As the city had found the old system inadequate and it was several years old, it is a fair inference that its earnings did not increase over what it had previously earned. Had the funds, thus allocated to System No. 1 for the retirement of its certificates, after the cost of maintenance, been properly applied, the total principal and interest maturing, \$232,350. would have been satisfied and there would have been remaining in the fund a balance of \$156,551.77, available for retirement of certificates not yet matured. During this period, however, the city paid only \$175,225 of matured principal and interest of the original certificates, there being actually in default, on April 30, 1939, matured principal and interest of \$57,125 of those certificates.

The \$355,723.07 allocated to fund No. 2 would have met all maturing principal and interest on certificates payable out of that fund during the same period, the total maturing principal and

interest being \$266,100. After satisfaction of these maturities, there would have been left from the earnings, allocated to No. 2, a surplus of \$89,632.07 applicable to principal and interest not yet matured. As a matter of fact, however, during said period, the city retired only \$129,675 of principal and interest of these certificates. As a result, it was in default in principal and interest on this series in the sum of \$136,425.

We have related these facts in order that the situation may be clear and the positions of the parties viewed in connection with the surrounding circumstances. Defendants' contention is that when the city issued the certificates to buy plant No. 1, it thereby exhausted all its statutory power and had no right thereafter to issue additional certificates payable out of funds arising from earnings of the extension or enlargement. But the act authorizes cities to build, purchase or extend waterworks "systems". does not forbid more than one system, but strongly suggests power to build, enlarge and pay for more than one system. It contemplates purchase or construction of a plant and, in addition, extension or enlargement thereof, and expressly authorizes the city, in payment of the cost of such building, enlargement or extension, to issue water fund certificates, payable out of the proceeds arising from the operation. It would seem obvious that the legislature did not contemplate that the city might allocate funds arising from earnings of an existing system to payment of the cost of any extension at the expense of outstanding certificates. The latter were valid obligations of the city and holders' right therein could not constitutionally be damaged. The funds allocated to the payment of existing certificates were, by statute, inviolate for that purpose and the city would not legally pledge them to secure additional securities. But we find nothing in the act and no decision of Illinois holding that the city might not authorize extension of an inadequate system and pledge the earnings from such extension to the payment of certificates issued in payment of its cost. The legislature granted power to a municipality to create and maintain a waterworks system which if in time became inadequate it might enlarge or extend. There is no curtailment of municipal authority in this respect; it is only essential that the securities previously issued be in no wise repudiated or injured. The act includes nothing implying that, having once issued certificates, the city was rendered powerless to enlarge or extend an inadequate system merely because certain valid outstanding certificates were still to be paid, so long as the inviolability of such existing certificates was protected and preserved.

Nor did the attempted allocation of earnings from the two plants work any violation of the act. By the ordinance the earnings of the two systems were actually and expressly allocated equitably to the certificates of the original system and those of the enlargement. It is of no moment that the ordinance referred to funds No. 1 and No. 2. It was not essential that the funds be separated upon the books. It was only necessary that the earnings be applied, when distributed, in accord with the rights of the respective securities outstanding under the two issues.

True it is that the city failed to live up to its ordinance in that it did not install meters. But it is also true that the evidence clearly justifies a definite finding of the amount earned by the formerly existing system and the amount earned by virtue of the enlargement. It was only necessary, therefore, that the city, in distributing the earnings, abide by its obligations under its respective trusts and apply the respective proportions to the respective issues. This entailed little or no additional bookkeeping and no hardship would have arisen in preserving the inviolability of the two issues. Each of the respective earnings was far more than sufficient to meet the necessities of each of the respective series. We think that the acts of the city were clearly within the legislative enactment of 1899 and we believe our reasoning is supported by such decisions as Ward v. City of Chicago, 342 Ill. 167, 173 N.E. 810; Simpson v. City of Highwood, 372 Ill. 212, 23 N.E.2d 62, 124 A.L.R. 1459, as well as City of Jerseyville v. Connett, 49 F.2d 246: Connett v. City of Jerseyville, 96 F.2d 392, decided by this court. The act of July 8, 1927, Smith-Hurd Stats., Ill. c. 24, § 456a et seq., which expressly provided for allocation of earnings of different systems, it seems to us, does not militate against the validity of these certificates under the act of 1899. The later act did not repeal the first; it only created additional and more facile methods. However, under its history in Illinois, the statute of 1899 appears to be equally comprehensive in providing equally efficient remedies. Evidently the act of 1927 was enacted out of an abundance of legislative caution.

There is another reason why the decree of the court in refusing to declare the certificates invalid was proper. It is clear that the city had, under the act of 1899, power to build and to enlarge water systems. The city was not without legislative authority to act. The most that can be said in defendants' favor is that it had power to do what it did but employed the wrong formula. This presents no absence or lack of authority but mere irregularities in doing something which the statutes had given it power to do. In the former case, a municipality is not estopped. In the latter, where securities have been issued and the city has received the benefit, it is estopped to set up the irregularities. Thus, in Burr v. City of Carbondale, 76 Ill. 455, the court said:

"So, by parity of reasoning and analogy, if a municipal corporation, authorized by law, issue its bonds in furtherance of a corporate purpose, and in substantial compliance with the law authorizing their issue, and such bonds come into the hands of an innocent holder, even if there be irregularities not going to the power, the bonds must be held valid. If the power existed, the act is binding. . . . Where the power to issue bonds existed, the corporation is estopped from setting up irregularities in the issue of the bonds after repeated payments of interest thereon."

Commenting more sharply upon the attempt of the city to plead invalidity in the face of its enjoyment of the benefits of its acts, the court added: "No charge of fraud, combination or oppression is made. Every act seems to have been fairly done, and in pursuance of law. The disreputable feature of the case is, that the same authority doing all these acts, and whose city has received the benefit of them, now seeks to repudiate them. There is no rule of law, equity, justice or morals compelling this, and we can not sanction it."

Pertinent in this respect, also, are People ex rel. Colfax v. Maxon, 139 Ill. 306, 28 N.E. 1074, 16 L.R.A. 178; Chicago, Rock Island & Pacific Railroad Co. v. City of Joliet, 79 Ill. 25; Lee v. Town of Mound Station, 118 Ill. 304, 8 N.E. 759; Webster v. Toulon Township High School District, 313 Ill. 541, 145 N.E. 118; City of Chicago v. McGovern, 226 Ill. 403, 80 N.E. 895; Mc-Govern v. City of Chicago, 281 Ill. 264, 118 N.E. 3. As we said in Bank of Burlington v. City of Murphysboro, 96 F.2d 899, 904, "the trustee municipality is estopped to set up its own wrongdoing to justify its refusal to account for and pay over trust funds which it has collected for the benefit of the claimant, who, in equity and good conscience, is entitled to be paid." And as said by the court in Cook v. City of Staunton, 295 Ill.App. 111. 14 N.E.2d 696, 700, "Notwithstanding such irregularities in the issuing of the bonds the city has collected the assessments levied with which to pay said bonds and interest thereon, and paid in full all of the bonds of the first six series, and none are outstanding, and is estopped to set up as a defense in a suit instituted for the collection of such bonds as are outstanding its own irregularities in the execution of a power clearly granted it." Irrespective of any question of existence of invalidity of the issue under the facts in this record, the city is plainly estopped to assert it.

The judgment of the District Court will, in so far as it is inconsistent with the views expressed herein, be reversed and remanded with directions to proceed in accord with the expressions herein contained. In all other respects it is affirmed.

The Getz case is discussed in 42 Col.L.Rev. 395, 415 et seq. (1942). As pointed out there, many revenue bond statutes provide that the borrower may be required to account as if it were trustee of an express trust for the holders of the bonds. A valuable contribution of the Getz case was the conception developed in the opinion, of unitary liability and unitary accounting with respect to the bond issue as a whole, which accords with basic revenue bond theory and offers a way of escaping the administrative difficulties of accounting to individual bondholders. The logic of revenue bond-theory directs that we take the further step of having the accounting unit pay the ascertained amount into the proper special fund for distribution in accordance with the bond proceedings instead of paying the bondholders directly.

SECTION 5. RECEIVERSHIP AND OPERATING TRUSTEESHIP

- a. Resort to a receivership to complete construction of a public work might be a helpful recourse where revenue bond financing had been employed. As indicated in 42 Col.L.Rev. 395, 427 (1942), few enabling statutes have provided for such a contingency. As a practical matter, this factor is usually covered by requiring the contractor to furnish a completion bond.
- Operating receiverships are much more significant. availability of the remedy as to local affairs generally depends upon statute, even though legal remedies be plainly inadequate. Government by receivership rested on nothing more than broad equity powers would hardly have much appeal, in the face of traditional ideas of separation of powers and local autonomy. Rees v. City of Watertown, 19 Wall. 107, 22 L.Ed. 72 (1873); Depew v. Venice Drainage District, 158 La. 1099, 105 So. 78 (1925); Mara v. San Jacinto, etc., Irrigation District, 131 F. 780 (S.D.Cal. 1904): Note 113 A.L.R. 755 (1938). The North Carolina court has taken the position that an ad hoc unit, such as a drainage district, stands on a different footing from general function units in this respect. Broadhurst v. Board of Commissioners of Pender County Drainage District, 195 N.C. 439, 142 S.E. 477 (1928). A helpful discussion of the receivership cases will be found in A. M. Hillhouse, Municipal Bonds 297 et seq. (1936). See also Note 50 Harv.L.Rev. 946 (1937). Jurisdiction can and has been conferred by statute in a limited number of instances. A Tennessee statute. which authorized a state court receivership for the City of Memphis, was involved in Meriwether v. Garrett, 102 U.S. 472, 26 L.Ed. 197 (1880). Appointment of a receiver to collect taxes, by

foreclosure of liens if need be, has not troubled the courts where the proceeding was authorized by statute. Guardian Savings & Trust Co., Trustee, v. Road Improvement District No. 7 of Poinsett County, Arkansas, 267 U.S. 1, 45 S.Ct. 201 (1925); Duval Cattle Co. v. Hemphill, 41 F.2d 433 (C.C.A. 5th, 1930). Separation of powers might provoke judicial disapproval of the exercise by a receiver of the power to levy taxes, which is, of course, regarded as legislative in character. The Oregon Municipal Administration Act met disaster on that very shoal in City of Enterprise v. State. 156 Or. 623, 69 P.2d 953 (1937). The same fate may await the attempted exercise of utility rate-making by a receiver of a municipal utility in behalf of revenue-bondholders where the function is conceived to be legislative as distinguished from the simple matter of a seller setting the price of his wares. Connett v. City of Jerseyville, 110 F.2d 1015 (C.C.A. 7th, 1940). This does not leave the creditors empty-handed. Local exercise of ratemaking as well as the power of taxation may be compelled by judicial decree. As the court put it in the Connett case (at 110 F.2d 1021):

We are satisfied that the District Court has jurisdiction to determine the amount of principal and interest due on the certificates and to enforce and compel defendant's performance of its duties under the amendatory act by a decree which will require the defendant to adopt a schedule of rates which will produce sufficient income to pay the costs of operation, maintenance, provide an adequate depreciation fund and pay the interest upon the certificates of indebtedness and discharge the principal within a reasonable period of time.

Statutory provision for operating receiverships of revenue bond projects is common. Here the objection to government by receivership is at a minimum since the control is confined to the revenue-producing facilities which underlie the revenue bonds. This type of sanction is of peculiar importance in the revenue bond situation, since so much depends upon good management. It is not the only possible recourse. Another potential remedy is the operating trusteeship.

c. "While less commonly conferred than receivership, this remedy is, in some respects, superior. It is a device by which, upon default, control of the properties may be privately shifted to a representative of the bondholders without having to go to court. The representative will be the trustee under the indenture or the bond ordinance or resolution where one is provided; otherwise, the responsibility is to be rested upon a special trustee. The power may be granted to the bondholders directly, particularly where the Government is a lender. This saves costs. Moreover, it places

the bondholders fully in the saddle, especially where, as in some indentures, the bondholders reserve the power to remove the trustee. Practical considerations, however, which militate against the device, are the diffidence, to put it mildly, of corporate trustees, exculpatory clauses notwithstanding, about bearing the responsibility of operation and the want of a cushion against uncertainty and risk. A receiver can work closely under the mantle of the court and guard his every step by court order." 42 Col.L.Rev. 395, 430 (1942).

d. Liquidating Receivership and Foreclosure

"Liquidation of properties has no place in the normal revenue bond picture because the security is confined to revenues. Even where the bonds are additionally secured by a mortgage actual liquidation is not always contemplated; the purchaser at foreclosure under some enabling acts is entitled not to absolute ownership but to control and enjoyment, including a franchise in the case of utility properties, for a limited period of years after which full dominion is to be restored to the debtor.\(^1\) One would suppose that general equity powers, without the aid of statute, might ground the appointment of a receiver pending foreclosure where the protection of the security bespoke such a precaution.\(^2\) There receivership would be playing its historic ancillary role; it would be an incident to a much more drastic remedy.

"I venture to say that a mortgage upon physical properties is not a particularly valuable security in itself. But there is no choice in the matter where the enabling act authorizes mortgage revenue bonds alone, as distinguished from straight revenue obli-

^{1 [}Footnotes renumbered.] Ala. General Acts 1927, No. 292, p. 278 (providing for the creation of the Alabama State Bridge Corporation and authorizing the pledge of tolls and certain state revenues to the payment of its bonds, with provision for foreclosure by way of giving the purchaser the right to operate for the tolls provided for by the act for such period as the corporation might agree to be necessary for the "lender" [purchaser?] to get a return of the moneys with not over six per centum interest and the amount of the expenses of foreclosure and administration). See Alabama State Bridge Corporation v. Smith, 217 Ala. 311, 116 So. 695 (1928).

III.Laws 1899, p. 104 § 5 (providing for foreclosure of water system mortgage by sale to the person offering to satisfy the decree for the right to enjoy the revenues of the system during the least number of years, not exceeding fifty). See City of Jerseyville v. Connett, 49 F.2d 246 (C.C.A. 7th, 1931).

² Connett v. City of Jerseyville, 110 F.2d 1015 (C.C.A.7th, 1942) and Karel v. City of Eldorado, 32 F.2d 795 (E.D.III.1929). The reports do not make the point clear but one is led to suppose that the appointment of the receiver was uncontested in both of these cases. Certainly there is no discussion of the propriety of the appointment.

gations.³ Sale to third parties on foreclosure is likely to be meaningless for want of bidders and the bondholders want the benefits of their investment or cash, not the properties. Once in private ownership the properties would be subject to taxation and to rate regulation in all cases.⁴

"But the threat of foreclosure may have the salutary ulterior effect (for the bondholders) of prodding the debtor into digging up the necessary funds wherever it can lay its hands upon them in order to cure a default in preference to losing the properties. That is apparently what happened in the Pennsylvania case of Realty Company v. Borough of Port Vue.⁵ The cryptic opinion of the supreme court is not very revealing but it does disclose that the court was quite aware of this aspect of the case.⁶

"Foreclosure of municipal utility properties would be meaningless were the purchaser not assured a franchise to operate and statutory coverage is usually accorded the matter." Exclusive franchises are not favored by the law and should depend in these cases upon clear statutory authority. On the other hand, a non-

³ E. g., La.Const. of 1921, Art. XIV, § 14 (m), La.Laws Ex.Sess.1921, Act No. So, § 1, as amended by La.Laws 1st Ex.Sess.1935, Act No. 12, § 2, La.Gen. Stats. (Dart, 1939) § 5757.

⁴ The prospect for bidders is even bleaker where the purchaser would not get title but simply the right to operate for a given period. Connett v. City of Jerseyville and Karel v. City of Eldorado, both supra note 2, were primarily foreclosure proceedings under such a scheme but one reads nothing about any bidders.

^{5 318} Pa.St. 374, 178 A. 466 (1935).

⁶ The writer has not had access to the opinion of the lower court, reported in (1936) 84 Pittsburgh Leg.J. 441. It is discussed at length by Knappen, Revenue Bonds and the Investor, 66 et seq. (1939).

This pressure toward resort to tax monies to prevent loss of properties by foreclosure has been a pertinent factor in the disposition of the question whether mortgage revenue bonds constitute debts in the debt limitation sense. The sound view of the matter, it is believed, is to hold the bonds debts only when the mortgage covers existing properties and is not confined to properties acquired with the bond proceeds. Clarke v. South Carolina Public Service Authority, 177 S.C. 427, 181 S.E. 481 (1935). Cases adverse to a mortgage on existing properties are fairly numerous. See Broward County Port Authority v. State, 129 Fla. 73, 175 So. 796 (1937), citing earlier cases, and the cases cited by Foley, "Revenue Financing of Public Enterprises" 35 Mich.L.Rev. 1 at 17, n. 68 (1936). There is, however, some authority supporting such a mortgage. Brockenbrough v. Board of Water Commissioners, 134 N.C. 1, 46 S.E. 28 (1903).

⁷E. g., La.Const. of 1921, Art. XIV, § 14 (h), (Maximum of 40 years); Ohio Const., Art. XVIII, § 12 (maximum of 20 years); Tex.Rev.Civ.Stat. (Vernon 1925) Art. 1111 (maximum of 20 years).

⁸⁴ McQuillin, Municipal Corporations (2d ed. 1928) §§ 1758-1761. FORDHAM LOCAL GOV.U.C.B.-42

exclusive franchise will hardly be adequate without the support of a covenant against future municipal competition.9

"A few enabling acts give bondholders a 'statutory mortgage lien' upon the subject properties.\(^{10}\) The South Carolina court has said that the lien partakes "of the nature of a purchase money mortgage.\(^{11}\) It is not believed that the court meant that the lien is forecloseable.\(^{12}\) The Court of Appeals of Kentucky has shown that the actual sanctions are the usual revenue bond remedies.\(^{13}\) But it would not concede that the lien was an empty thing. It said:

"The statutory lien which is given by the aforesaid act and by the ordinance is not a meaningless expression. The bondholders have a lien on the income, and in the event the city should decide to sell its waterworks system the bondholders would have a lien on the proceeds of the sale to satisfy the bonds.¹⁴

"This assumes that the purchaser at a voluntary sale by the city would take title free from the lien. But why so? It is the practice in Arkansas to record the bond ordinance but unless the transaction is covered by the recording act, or the enabling act exacted recording, one would suppose that the purchaser would be bound without recording even in the absence of actual notice of the existence of the lien. Doubtless, however, this would be true with respect to an ordinary revenue bond issue dependent simply upon a pledge of revenues. This is not to overlook the usual covenant against alienation; even if the pledge of revenues is preserved after alienation the bondholders obviously want public (taxfree, and so on) operation, not private control. It still remains to be demonstrated just what a statutory mortgage lien adds to the simple pledge of revenues." 42 Col.L.Rev. 431–433 (1942).

A word should be said concerning priorities. The first come first served idea has been applied to general obligation bonds pay-

⁹ Such a covenant is assuredly not present in the ordinary mortgage revenue bond scheme.

Texas presents an interesting angle on foreclosure. The state constitution forbids forced sale of public property, so the approved practice is to give the trustee, under the mortgage (deed of trust) a power of sale. City of Dayton v. Allred, 123 Tex. 60, 68 S.W.2d 172 (1934).

¹⁰ E.g., Ky.Laws, 1926, c. 133 § 7, Carroll's Ky.Stats. (1936) § 2741 L 7; S.C. Laws 1933, Act No. 465, § 8.

¹¹ Cathcart v. City of Columbia, 170 S.C. 362, 369, 170 S.E. 435, 438 (1933).

¹² The opinion in the case cited at this juncture by the court contained such a statement concerning a simple pledge of revenues. Bates v. State Bridge Commission, 109 W.Va. 186, 153 S.E. 305, 307 (1930).

¹³ City of Bowling Green v. Kirby, 220 Ky. 839, 848, 295 S.W. 1004, 1008 (1927).

¹⁴ Ibid.

able from legally unlimited taxes. State ex rel. Du Pont Ball, Inc., v. Livingston, 104 Fla. 33, 139 So. 360 (1932). This may work serious inequalities where economic ability to pay is, in fact, limited. The pro rata rule is more equitable. Rittenoure v. City of Edinburg, 159 F.2d 989 (C.C.A. 5th, 1947); 42 Col.L.Rev. 395, 433 (1942); Note 21 Calif.L.Rev. 161 (1933).

The limited source of payment for revenue bonds demands application of the pro rata rule. Two ideas borrowed from corporation finance facilitate the process. In many revenue bond proceedings an option is given the bondholders, or a trustee acting for them, to accelerate all maturities in the event of default. This establishes a basic equality unknown to general obligation serial bonds. Provision may be made, particularly in larger revenue bond issues, for the representative assertion of remedies. Some statutes go the whole way by making representative action through the instrumentality of a trustee exclusive. E.g. N. Y. Public Authorities Law § 567 (1939) (Triborough Bridge Authority).

SECTION 6. SPECIAL PROBLEMS OF FEDERAL JURISDICTION

Despite the overthrow of the independent federal rule of estoppel by recital, federal court jurisdiction is still important to creditors of local government. The very existence of the federal courts with diversity jurisdiction is very significant to the members of the creditor group. A number of problems peculiar to federal court litigation may confront them.

"The Supreme Court has decided that the members of a bond-holder's protective committee, to whom title to bonds has been transferred with a measure of control comparable to that of trustees of an express trust, do have standing to sue on the bonds of the debtor city located in a state of which none of them are citizens. Likewise, a trustee under an indenture, authorized therein to sue for the bondholders, may proceed in a federal court against a non-resident debtor. This is a commonplace as to corporate bonds. 16

"Still a third type of situation is presented by an enabling act providing for the appointment of a trustee by the holders of reve-

¹⁵ [Footnotes renumbered.] Bullard v. City of Cisco, 290 U.S. 179, 54 S.Ct. 177 (1933). Followed in City of Corpus Christi v. Hayward, 111 F.2d 637 (C. C.A.5th, 1940); and Royal Oak Drain Dist., Oakland County, Mich. v. Keefe, 87 F.2d 786 (C.C.A.6th, 1937).

¹⁶ Chase National Bank of City of New York v. Citizens Gas Co. of Indianapolis, 113 F.2d 217 (C.C.A.7th 1940), reversed on another ground, 314 U.S. 63, 62 S.Ct. 15 (1941).

nue bonds, after default, for the purpose of enforcing their rights. The trustee has been given legal title to the extent of the remedial rights associated with the bonds and for purposes of assertion in a representative capacity in any forum. Thus, there should be no serious question as to his standing in a federal court even though he, like a trustee under an indenture, does not have full legal title to or custody of the bonds.¹⁷

"The writ of mandamus is abolished by the New Rules of Civil Procedure. 18 The same relief is now obtained by motion. jurisdictional change is effected by the rules; it is still true, subject to irrelevant statutory exceptions, that the writ, now order, may be issued only in aid of a jurisdiction already otherwise acquired. In the general obligation bond situation jurisdiction is established by an action on the bonds. 19 But a general judgment is not obtainable on revenue bonds. The problem arose long ago with respect to special assessment bonds and Judge Dillon, the father of modern municipal bonds, found a way out,20 which was later approved by the Supreme Court.²¹ His notion was that action be brought on the bonds for a special judgment expressly made enforceable only by mandamus. The same could be done in the case of revenue bonds.²² Mandamus, or its equivalent, will often, however, be sought by holders of revenue bonds to enforce performance of various duties of the debtor before there is any occasion to ask for a declaration or special judgment on the bonds. Then, they may turn to the Federal Declaratory Judgment Act,23 under which the court may retain jurisdiction in order to grant further appropriate relief.24 As a matter of fact Judge Dillon's device was

¹⁷ Were it otherwise the holders of bonds of a typical issue under the New York Public Authorities Law, which, as we have seen, provides for representative suits to the exclusion of individual actions by bondholders, would confront a nice dilemma.

¹⁸ Fed.Rules Civ.Proc., Rule 81 (b).

¹⁹ DeFoe v. Town of Rutherfordton, 122 F.2d 342 (C.C.A.4th, 1941).

²⁰ Jordan v. Cass County, Fed.Cas.No.7517 (C.C.W.D.Mo.1874).

²¹ County of Cass v. Johnston, 95 U.S. 360 (1877). See also Davenport v. County of Dodge, 105 U.S. 237 (1881); Cushman v. Warren-Scharf Asphalt Paving Co., 220 F. 857 (C.C.A.7th, 1915) certiorari denied 238 U.S. 621, 35 S.Ct. 603 (1915).

²² City of Corpus Christi v. Hayward, supra note 15 and City of Hamlin, Tex. v. Brown-Crummer Investment Co., 93 F.2d 680 (C.C.A. 5th, 1937), certiorari denied 303 U.S. 664, 58 S.Ct. 831 (1938), were actions on revenue bonds or coupons. Illegality defeated recovery. No point was made of the "conditional judgment" problem.

^{23 48} Stat. 955, as amended by 49 Stat. 1027 (1935), 28 U.S.C. § 400 (1941).

²⁴ The Act provides that further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. See Chase National Bank of the City of New York v. Citizens Gas Co. of Indianapolis, 113 F.2d 217, 230 (C.C.A.7th, 1940), reversed on another ground, 314 U.S. 63, 62 S.Ct. 15 (1941).

essentially a form of declaratory judgment. If it should come to pass that the federal courts take a narrow view of this subject, the mandatory injunction, adequate legal redress not being available, may be expected to come to the fore.²⁵

"Do the remedial provisions of the state revenue bond enabling acts govern in diversity cases in the federal courts?

"Since the Tompkins decision 26 the problem as to whether state unwritten law governs is being formulated in terms of 'substantive law' versus 'procedure.' It is the same formulation that had previously been employed as to statute law with respect both to legal and equitable matters. The so-called Rules of Decisions Act. 27 which constituted a part of the original Judiciary Act, requires the federal courts to give effect to state statutes creating substantive legal rights in cases where they apply and the principle applied as to equitable rights is substantially the same.28 There are signs that holders of revenue bonds are destined to do some groping in the penumbra between substantive law and procedure before it is sufficiently illumined. Already the Circuit Court of Appeals for the Second Circuit has held 29 that under the Tompkins case state law governs the question whether the issuance of mandamus to compel the levy of taxes to pay general obligation bonds is discretionary with the court. This conclusion led the court to abandon a discretion it had exercised in a pre-Tompkins decision in a similar case arising in the same state.³⁰ In the Fourth Circuit, however, Judge Parker has declared for the court that the right to mandamus to compel a tax levy to pay general obligation bonds is a procedural matter. 31 But he concluded that state law governed by force of Rule of Civil Procedure 69(a), which requires state practice and procedure to be followed in procedure on execution and in proceedings supplementary to and in aid of judgment.32 A proceeding in the nature of mandamus for

²⁵ See "Mandatory Injunction," supra.

²⁶ Erie R. R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938).

^{27 1} Stat. 92 (1789), 28 U.S.C. § 725 (1941).

²⁸ This much is conceded even in Pusey & Jones Co. v. Hanssen, 261 U.S. 491, 43 S.Ct. 454 (1923). As to the equity aspect since the Tompkins case see Russell v. Todd, 309 U.S. 280, 60 S.Ct. 527 (1940); and Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 58 S.Ct. 860 (1938).

²⁹ Borough of Fort Lee, N. J. v. United States ex rel. Barker, 104 F.2d 275 (C.C.A.3d. 1939).

³⁰ City of Asbury Park, N. J. v. Christmas, 78 F.2d 1003 (C.C.A.3d, 1935).

³¹ See DeFoe v. Town of Rutherfordton, 122 F.2d 342, 344 (C.C.A.4th, 1941).

³² Rule 69 (a) reads, in part, as follows:

[&]quot;Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time

the collection of a judgment falls, said he, in the latter category. It is extremely doubtful that Rule 69(a) will have any bearing upon revenue bond remedies because it relates only to judgments for the payment of money, presumably general judgments.³³ Holders of revenue bonds may frequently, as we have observed, seek mandamus before obtaining even a special judgment on the bonds. Thus, under the Parker view, the state law would not bind a federal court upon such questions as whether mandamus or mandatory injunction, for that matter, was available as of right or lay in the discretion of the court.

"The revenue bond implications of the Parker view are rather disturbing. If the remedial provisions of an enabling act do not govern in federal cases there is a serious disability from the outset in planning a revenue bond set-up: the court having jurisdiction in a given case may be one not bound to respect the remedial scheme adopted by the state. That state law entitled bondholders. upon default, to a receivership as of right would not carry the day in a federal case: the court would apply federal receivership law. Concededly there are considerations that militate the other way. In times of stress a state court might be constrained to seize upon a dubious interpretation of the enabling act favorable to the debtor. It would be to the advantage of the bondholders for the federal courts not to be governed by that interpretation. The risk of such state court pliability is not believed to be substantial, however. This observation is fortified by the record of the state courts during the recent depression. Unlike the case of a serious general obligation bond default in depression years, moreover, a revenue bond default would not be expected to bring into play sanctions of dire consequence to the community. Back-breaking taxes to pay water bonds is one thing, a waterworks receivership another.

"This notion of federal court conformity does no violence to the substantive law versus procedure formula. The distinction is not ultimate; it is merely a working tool with a none-too-fine edge. It ought then to be flexible enough to permit treatment of revenue bond remedies as substantive rights giving realistic weight to the intimate relations of those remedies to the primary right to payment from the special fund. The chief obstacle that confronts us is the famous case of Pusey & Jones v. Hanssen.³⁴ There, the Supreme Court decided that the district court sitting in Delaware

the remedy is sought, except that any statute of the United States governs to the extent that it is applicable."

³³ It would be pertinent in the exceptional case where holders of revenue bonds recovered generally against the borrower on a breach of trust theory, or what not.

^{34 261} U.S. 491, 43 S.Ct. 454 (1923).

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had improperly granted a simple contract creditor a receivership of an insolvent Delaware corporation in reliance upon a law of that state empowering the chancellor, in his discretion, to grant such relief, for the reason that the statute conferred merely a remedy, not a substantive right, and thus could not affect federal equity proceedings. Mr. Justice Douglas recently added the following capstone:

This Court has frequently admonished that a federal court of equity should not appoint a receiver where the appointment is not a remedy auxiliary to some primary relief which is sought and which equity may appropriately grant.³⁵

"The obstacle is not insurmountable. To begin with, an operating receivership of a revenue bond project is an independent primary remedy, not ancillary relief. The object is to wrest control from the debtor as a direct means of protecting the security and effecting payment of principal and interest; it is an adjunct neither of a creditor's bill, nor of foreclosure, nor of any other remedv. As we have seen, moreover, receivership may be made available to the bondholders as of right, unlike the discretionary remedv created by the Delaware statute involved in the Hanssen case. This would appear to be enough to satisfy the Court; Mr. Justice Brandeis practically said as much.³⁶ Just why the elimination of discretion makes the difference is none too clear to me; it is not evident why the one may be said to enter into the primary obligation to pay, and the other not. It is an odd contrast with the Fort Lee case.³⁷ where a determination that state law governed was made independently in order to enable the court to decide whether mandamus was to be treated as discretionary.

"It is my thesis, that, whether it involves discretionary elements or not, the statutory remedial scheme supporting revenue bonds is so intimately associated with the special obligation itself that the federal courts might, with realism, treat it as part and parcel of the obligation, if need be to justify their recognition of it. This leaves ample room for procedural differences in the ad-

³⁵ See Kelleam v. Maryland Casualty Co. of Baltimore, Md., 312 U.S. 377, 381, 61 S.Ct. 595, (1941).

^{36 261} U.S. at 498. Draftsmen of "as of right" provisions doubtless have had an eye to the Hanssen case.

It should be noted that the problem created by the constitutional right to jury trial in federal court actions at common law is not likely to be important in revenue bond cases because where an equitable remedy, provided by state law, is sought, it is unlikely that the remedy at law will be adequate. See generally Dobie and Ladd, Cases and Materials on Federal Jurisdiction and Procedure (1940) 810–812.

⁸⁷ Borough of Fort Lee, N. J. v. United States ex rel. Barber, 104 F.2d 275, (C.C A.3d, 1939).

ministration of such remedies." 42 Col.L.Rev. 395, 436-441 (1942).

It has been asserted by a leading authority that the logic of the Supreme Court's decisions and the objectives of the Erie case "compel a complete repudiation of the equitable remedial rights doctrine in diversity cases." 2 Moore's Federal Practice 451 (2d ed. 1948).

SECTION 7. DEBT ADJUSTMENT

In the historical notes in Chapter One, brief reference was made to the default record of units of local government during periods of financial stringency in the last century. The favorable experience of the investing public with municipals during the first quarter of the present century dulled the memory of past tribulations. The members of the new generation of bond counsel and finance men were without practical experience in working out debt adjustments, although they were not unfamiliar with bondholders' remedies. The depression threw them into the midst of problems created by the most wide-spread and difficult local government defaults in our history. Nor were the states and their local units prepared for the shock. It was assumed that a state could not by statute force a dissenting creditor to participate in a plan of adjustment which modified pre-existing contract rights. There was little, if any, permanent legislation, within those limits, designed to implement debt adjustment and local unit financial rehabilitation.

While, as will later appear, there were instances in the late depression of both legislative and local obstructive tactics, the basic difficulty lay in sheer inability to pay and the spirit of outright repudiation was little in evidence. In the relatively simple situation where a unit otherwise able to pay was thrown into default by a peak in its maturity schedules, a refunding which would effect a balanced pattern of maturities would constitute a solution. The more common and more difficult case entailed a reduction in principal or interest, or both, if debt service was to be geared to ability to pay. There, too, the upshot was likely to be a refinancing involving an exchange of new securities for old. but the process of negotiation was far more complex and difficult. In addition to a deal of pulling and hauling the creditors as well as the debtors not uncommonly attempted through re-examination of the subject of present and future ability to pay. As has been forcefully stated elsewhere, the role of bondholders' remedies becomes, in such a situation, ancillary to the primary process of negotiation. Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees—Part IV Committees for the Holders of Municipal and Quasi-Municipal Obligations, 16 et seq. (Securities and Exchange Commission, 1936).

One device resorted to during the recent period of wholesale defaults was the employment by a debtor unit of a refunding agent, who undertook to negotiate with holders of outstanding bonds in exchange for bonds of a refunding issue under a plan worked out by the agent and the debtor. Bond houses served as agents. The key to the situation lay in the superior knowledge of the bond firm, which handled the original distribution of the defaulted bonds, as to the current ownership of those bonds. Some bond houses actively promoted that type of refunding operation in order to earn fees as "fiscal agents." The weaknesses in such a procedure are fairly evident.

AMERICAN UNITED MUTUAL LIFE INSURANCE COMPANY v. CITY OF AVON PARK

Supreme Court of the United States, 1940. 311 U.S. 138, 61 S.Ct. 157, rehearing denied 311 U.S. 730, 61 S.Ct. 395.

MR. JUSTICE DOUGLAS delivered the opinion of the Court. The District Court confirmed a plan for the composition of debts of respondent under Ch. IX of the Bankruptcy Act (50 Stat. 653; 52 Stat. 939, 940).³⁸ The Circuit Court of Appeals affirmed that order. 108 F.2d 1010. Petitioner, a creditor of the city, having objected to the confirmation in the courts below, brought the case here on a petition for certiorari, which we granted in view of the importance of the problems in the administration of the composition and reorganization provisions of the Act.

The city's composition was a refunding plan worked out by it and its fiscal agent, ³⁹ R. E. Crummer & Co. Pursuant to the fiscal agency contract both parties were to use their best efforts to induce the creditors to participate in the plan. The city was not to pay any of the costs of the refunding, as Crummer was

³⁸ [Footnotes renumbered.] The Act of August 16, 1937 (50 Stat. 653) under which the petition was filed expired June 30, 1940, except in respect to proceedings initiated on or prior to that date. That Act, however, was amended by the Act of June 28, 1940 (76th Cong. 3d Sess., c. 438, 54 Stat. 667), which, inter alia, extended for another two years the time for filing petitions.

³⁹ R. E. Crummer & Co. is a Delaware corporation organized primarily to represent clients of an affiliate (see infra, note 4) who had purchased bonds in Florida. Beginning in 1931, it had handled the debt problems of over 200 taxing units.

to defray all expenses incident to assembling the bonds, printing the refunding bonds, representing the city in proceedings to validate the new bonds, obtaining a legal opinion approving the bonds, etc. The fiscal agency contract provided that Crummer was to be compensated for its services and reimbursed for its expenses by assessing charges against the participating bondholders. This charge was \$40 for each \$1000 bond; or in case the bondholders elected to sell Crummer the interest coupons, accrued to July 1, 1937, at one-third of their face amount⁴⁰ the charge was to be \$20 per \$1000 bond.

Crummer solicited assents to the plan. Approximately 69% of the bondholders accepted. But for the claims held by the Crummer interests, 41 and voted in favor of the plan, the requisite two-thirds statutory vote, however, would not have been obtained. Some of these claims had been purchased prior to the fiscal agency contract, some later. The average price was apparently about 50ϕ on the dollar. The inference seems clear that some of them were acquired in order to facilitate consummation of the composition by placing them in friendly hands. But the record does not show whether or not Crummer disclosed to the bondholders when their assents were solicited that it was a creditor as well as the city's fiscal agent, the extent of the claims held by it and its affiliate, the circumstances surrounding their

⁴⁰ Under the original plan all such accrued interest coupons were to be acquired by Crummer at 33-\%% of the face amount, which when refunded into new bonds, would be held by it subject to purchase by the City at not exceeding 50% of the face thereof for the first six months, 60% for the succeeding six months, 70% for the next six months, and 75% for the following six months. Due to fears of illegality, the plan was modified. As modified it provided that compensation of the fiscal agent was to be 4% of the principal debt with the right of any creditor to sell to Crummer the interest accruals at 33-\%% of their face amount. In the latter event the charge against him was reduced to 2% and Crummer held the securities so obtained subject to the right of the city to acquire them at the rates above indicated. The fiscal agent estimated that it would get substantially the same amount of money out of the plan whichever option the bondholders elected.

Interest accruals were to be escrowed. Proceeds of the collection of delinquent taxes were to be remitted to the escrow agent who would reduce the amount owed by the city under the escrow by such amount as would result in the particular proceeds constituting a pro tanto payment and discharge at 50% of par during the first six months, 60% during the next six months, 70% during the next six months, and 75% during the following six months.

Thus in effect the interest accruals could be offset against delinquent taxes, the city being able to retire some of its debt at less than par if it could stimulate tax collections. The proceeds received by the escrow agent were to be held for the benefit of the depositors.

⁴¹ R. E. Crummer & Co. and Brown-Crummer Investment Co. R. E. Crummer was president of both. A majority of the boards of both corporations was identical. The Crummer interests had acquired over a third of the claims.

acquisition, and its intent to vote those claims in favor of the plan. No such disclosure was made in the plan.

The District Court, however, found that the two-thirds of the aggregate amount of claims affected by the plan, required by § 83(d), 11 U.S.C. § 403(d), for confirmation, had assented. It also found that Crummer's compensation was fair and reasonable, that the plan and its acceptance were in good faith, and that the plan was fair, equitable and for the best interests of the creditors, and did not discriminate unfairly in favor of any creditor.

We disagree. The order of confirmation must be set aside. It cannot be said that the plan does not discriminate unfairly in favor of any creditor, that the acceptances were in good faith, that the requisite two-thirds vote of approval had been obtained.

Crummer had at least⁴² three financial stakes in this composition: (1) the fee to be collected from the bondholders; (2) its speculative position in such of the interest accruals as it might acquire from the bondholders at a third of their face amount; (3) the profit which might accrue to it or its affiliate, as a result of the refunding, on bonds acquired at default prices.

The court found that the first of these items was reasonable. But it apparently deemed the others irrelevant to the inquiry.

Clearly, however, no finding could be made under § 83(b), 11 U.S.C. § 403(b), that the compensation to be received by the fiscal agent was reasonable without passing on the worth of the aggregate of all the emoluments accruing to the Crummer interests as a result of consummation of the plan. Since that inquiry would necessitate an appraisal of the fiscal agent's speculative position in the plan, perhaps the definitive finding demanded by the Act could not be made. Yet that is a chance which the fiscal agent, not the bondholders, must take; for it is the agent who is seeking the aid of the court in obtaining one of the benefits of the Act. Moreover, to the extent that the aggregate benefits flowing to the Crummer interests exceeded reasonable compensation for services rendered, their reward would exceed

⁴² There were other emoluments for Crummer. It was granted "exclusive authority" to act for and on behalf of the city for a period of three years "in all matters connected with, or relating to, the exchange." And in case any bonds or coupons were presented for payment or suit instituted thereon the city agreed to give Crummer notice before any terms of settlement were agreed upon. These provisions, the fact that the Crummer interests hold large blocks of claims acquired at default prices, the likely interest of Crummer in the accrued coupons and its strategic position all point towards future speculative possibilities which are not inconsiderable, whatever may be said of their unhealthy impact on the city and the public investors alike.

what the court could authorize under § 83(b), 11 U.S.C. § 403 (b). Furthermore, if any such excess benefits would accrue to them, then the plan would run afoul of § 83(e) (1), 11 U.S.C. § 403(e) (1). For in that event the plan would discriminate unfairly in favor of the Crummer interests as creditors.

Hence the lack of that essential finding would be fatal in any case. It is especially serious here in view of the fact that without the vote of the fiscal agent the requisite two-thirds acceptance would not have been obtained. Where it does not affirmatively appear that full and complete disclosure of the fiscal agent's interests was made to the bondholders when their assents were solicited, it cannot be said that those assents were fairly obtained. Cf. Rogers v. Guaranty Trust Co., 288 U.S. 123, 143, 53 S.Ct. 295. And where without such disclosure the fiscal agent's vote was cast for acceptance of the plan, it cannot be said that such acceptance was in "good faith" within the meaning of § 83(e) (5), 11 U.S.C. § 403(e) (5). Here the fiscal agent was acting in a dual capacity. While it was representing the city, it likewise purported to represent the interests of bondholders. The very minimum requirement for fair dealing was the elementary obligation of full disclosure of all its interests. And the burden was on it to show at least that such disclosure was made. Equity and good conscience obviously will not permit a finding that an acceptance of a plan by a person acting in a representative capacity is in "good faith" where that person is obtaining an undisclosed benefit from the plan.

We have emphasized that full disclosure is the minimum reguirement in order not to imply that it is the limit of the power and duty of the bankruptcy court in these situations. As this Court stated in Securities and Exchange Commission v. United States Realty & Improvement Co., 310 U.S. 434, 455, 60 S.Ct. 1044: "A bankruptcy court is a court of equity, § 2, 11 U.S.C. § 11, and is guided by equitable doctrines and principles except in so far as they are inconsistent with the Act. . . . A court of equity may in its discretion in the exercise of the jurisdiction committed to it grant or deny relief upon performance of a condition which will safeguard the public interest." And see Pepper v. Litton, 308 U.S. 295, 304, et seq., 60 S.Ct. 238. These principles are a part of the control which the court has over the whole process of formulation and approval of plans of composition or reorganization, and the obtaining of assents thereto. As we said in Case v. Los Angeles Lumber Products Co., 308 U.S. 106, 114, 60 S.Ct. 1. "The court is not merely a ministerial register of the vote of the several classes of security holders." The responsibility of the court entails scrutiny of the circumstances surrounding the acceptances, the special or ulterior motives

which may have induced them, the time of acquiring the claims so voting, the amount paid therefor, and the like. See Continental Insurance Co. v. Louisiana Oil Refining Corp., 89 F.2d 333. Only after such investigation can the court exercise the "informed, independent judgment" (National Surety Co. v. Coriell, 289 U.S. 426, 436, 53 S.Ct. 678; Case v. Los Angeles Lumber Products Co., supra, p. 115) which is an essential prerequisite for confirmation of a plan. And that is true whether the assents to the plan have been obtained prior to the filing of the petition or subsequently thereto. Where such investigation discloses the existence of unfair dealing, a breach of fiduciary obligations, profiting from a trust, special benefits for the reorganizers, or the need for protection of investors against an inside few, or of one class of investors from the encroachments of another, the court has ample power to adjust the remedy to meet the need. The requirement of full, unequivocal disclosure; the limitation of the vote to the amount paid for the securities (In re McEwen's Laundry, Inc., 90 F.2d 872); the separate classification of claimants (see First National Bank v. Poland Union, 109 F.2d 54, 55): the complete subordination of some claims (Taylor v. Standard Gas & Electric Co., 306 U.S. 307, 59 S.Ct. 543; Pepper v. Litton, supra), indicate the range and type of the power which a court of bankruptcy may exercise in these proceedings. That power is ample for the exigencies of varying situations. It is not dependent on express statutory provisions. It inheres in the jurisdiction of a court of bankruptcy. The necessity for its exercise (Pepper v. Litton, supra, p. 308) is based on the responsibility of the court before entering an order of confirmation to be satisfied that the plan in its practical incidence embodies a fair and equitable bargain openly arrived at and devoid of overreaching, however subtle. Neglect of that duty is apparent here by inclusion of the vote of the claims held by the Crummer interests in computing the requisite statutory assents, without protection of the public investors through the requirement of full disclosure and of other appropriate safeguards. By the same token allowance of compensation to Crummer without scrutiny of Crummer's speculation in the securities does not comport with the standards for surveillance required of courts of bankruptcy before confirming plans of composition or reorganization or before making such allowances. The scope of the power of the court embraces denial of compensation to those who have purchased or sold securities during or in contemplation of the proceedings. As in case of reorganizations under former § 77B, the provision in § 83(b), 11 U.S.C. § 403(b), for allowance of "reasonable compensation" for "services rendered" necessarily implies "loval and disinterested service in the interest of the

persons" for whom the claimant purported to act. In re Paramount-Publix Corp., 12 F.Supp. 823, 828.

Beyond that is the question of unfair discrimination to which we have adverted. Compositions under Ch. IX, like compositions under the old § 12, envisage equality of treatment of cred-Under that section and its antecedents, a composition would not be confirmed where one creditor was obtaining some special favor or inducement not accorded the others, whether that consideration moved from the debtor or from another. In re Sawyer, Fed.Cas.No.12,395; In re Weintrob, 240 F. 532; In re M. & H. Gordon, 245 F. 905. As stated by Judge Lowell in In re Sawyer, supra, "if a vote is influenced by the expectation of advantage, though without any positive promise, it cannot be considered an honest and unbiased vote." That rule of compositions is but part of the general rule of "equality between creditors" (Clarke v. Rogers, 228 U.S. 534, 548, 33 S.Ct. 587) applicable in all bankruptcy proceedings. That principle has been imbedded by Congress in Ch. IX by the express provision against unfair discrimination. That principle as applied to this case necessitates a reversal. In absence of a finding that the aggregate emoluments receivable by the Crummer interests were reasonable, measured by the services rendered, it cannot be said that the consideration accruing to them, under or as a consequence of the adoption of the plan, likewise accrued to all other creditors of the same class. Accordingly, the imprimatur of the federal court should not have been placed on this plan. The fact that the vast majority of security holders may have approved a plan is not the test of whether that plan satisfies the statutory standard. The former is not a substitute for the latter. They are independent. See Case v. Los Angeles Lumber Products Co., supra, pp. 114-115.

Since the cause must be remanded, there are two other matters which should be mentioned. Section 83(d), 11 U.S.C. § 403(d), provides that in computing the statutory two-thirds vote necessary for confirmation of a plan all claims "owned, held, or controlled" by the city shall be excluded. So far as appears, the claims held by the Crummer interests were not owned by or held for the city. Yet it is by no means clear that they were not "controlled" by the city within the meaning of the Act. Claims held by a city's fiscal agent presumptively would seem to fall in that prohibited category. The abuse at which the Act is aimed is not confined to those cases where the holder of the claims is an agent of the city within the strict rules of respondeat superior. Rather, the test is whether or not there is such close identity of interests between the claimant and the city that the claimant's assent to the plan may fairly be said to be more the product of the city's

influence and to reflect more the city's desires than an expression of an investor's independent, business judgment. Here there was such a close identity of interests between Crummer and the city vis- $\hat{\alpha}$ -vis the refunding as to raise grave doubts as to the propriety of allowing those claims to vote in any event. That, however, is a question for appropriate findings by the court should another plan be presented.

Petitioner also urges that the fiscal agency contract between Crummer and the city was illegal under the decisions of the Supreme Court of Florida in Taylor v. Williams, 142 Fla. 402, 562, 756; 195 So. 175, 181, 184; 196 So. 214, and W. J. Howey Co. v. Williams, 142 Fla. 415, 562, 756; 195 So. 181, 184; 196 So. 214. Under § 83(e) (6), 11 U.S.C. § 403(e) (6), the court must be satisfied that the city "is authorized by law to take all action necessary to be taken by it to carry out the plan" before it may enter a decree of confirmation. Plainly that finding could not be made if it was clear, for example, that a taxpayer could enjoin the issuance of the new bonds or the levy of assessments therefor. The courts below did not pass on the applicability of these recent Florida decisions to this fiscal agency contract, since they were decided after the Circuit Court of Appeals affirmed the order of confirmation. Nor do we undertake to decide the question, in view of our disposition of the case. It is, however, a relevant inquiry to be made by the District Court as, if and when another plan of composition is presented, which directly or indirectly involves any such fiscal agency contract.

For the reasons stated we reverse the judgment below and remand the cause to the District Court for proceedings in conformity with this opinion.

Reversed.

In the difficult cases involving a considerable indebtedness and widely-dispersed holdings it was essential to effective negotiation that there be some form of bondholder representation. The most common arrangement was the organization of a protective committee under a deposit agreement. Each major class of creditors would be likely to have its own committee. The devise is an obvious borrowing from corporate reorganization experience.

BULLARD v. CITY OF CISCO

Supreme Court of the United States, 1933. 290 U.S. 179, 54 S.Ct. 177.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court. This was an action at law brought in the federal court for the

Northern District of Texas against the city of Cisco to recover on bonds and coupons issued by it. The plaintiffs were citizens of States other than Texas—three of New York and one of Ohio. The defendant city was a municipal corporation of Texas.

Of the pleadings it suffices now to say that the plaintiffs in their petition alleged that they were owners and holders of the bonds and coupons sued on, the former aggregating \$14,000 and the latter \$335,787.50; and that the defendant in its answer challenged the court's jurisdiction by alleging that the plaintiffs were not actual or beneficial owners of the bonds and coupons sued on but held them solely for purposes of collection on behalf of others who severally were the real owners, and one of whom could sue in the federal court because their respective holdings were not in excess of \$3,000.

The evidence at the trial, so far as now material, was to the following effect: The city of Cisco in 1902–1928 issued and sold, for considerations duly received, its bonds aggregating a large sum. Attached to the bonds were coupons to be paid from time to time. The bonds and coupons were all negotiable in form and payable to bearer. When this suit was begun the plaintiffs held \$2,115,000 of the bonds, \$14,000 thereof being past due and unpaid, and held past due and unpaid coupons aggregating \$335,787.50. These past due bonds and coupons are the ones in suit and the plaintiffs produced them in evidence.

All of the bonds and coupons held by the plaintiffs were transferred to them by prior holders in conformity with, and for purposes defined in, a bondholders protective agreement of January 3, 1930. The prior holders were all citizens of States other than Texas; but the extent of their respective holdings so transferred was not shown by the evidence, save as it disclosed that the coupons sued on included \$5,403.75 which, with the bonds to which they pertained, were received from George F. Averill, a citizen of Maine; \$3,120 which, with the bonds to which they pertained, were received from the Title and Guaranty Trust Company, a corporate citizen of Ohio; and \$5,590 which, with the bonds to which they pertained, were received from E. Sohier Welch, a citizen of Massachusetts.

The agreement of January 3, 1930, in general outline was much like the usual bondholders' protective agreement. The parties to it were, upon one hand, the plaintiffs, who were called the bondholders committee, and, on the other hand, all holders of bonds or coupons of the city who might thereafter deposit the same under the agreement in the manner provided.

There were introductory recitals that the city had failed to make payments of interest and principal in 1929; that it was de-

sirable that holders of the bonds and coupons should "unite and organize for the protection of their interests"; that this protection could be "accomplished most effectively and with the least expense" through the committee if it were invested "with full power and authority in the premises"; and that the committee had consented to act. Provisions then followed for a depositary which was to act on behalf of the committee and under its direction; for the deposit of bonds and coupons with the depositary by their several holders, the deposit to be such as would transfer to the committee "the complete and absolute title"; and for the issue to each depositor of a certificate of deposit transferable only upon the books of the depositary. Other related provisions declared that the registered holder of any certificate of deposit should be deemed "for all purposes to be the absolute owner thereof and of the bonds and/or coupons therein referred to, and neither the depositary nor the committee shall be affected by any notice to the contrary"; that each depositor should be deemed, by reason of his deposit, to have assented to and agreed to be bound by all provisions of the agreement; that no depositor should have "any right to withdraw any bonds or coupons from deposit" or "to take any separate action" with respect to them after their deposit; and that deposited bonds and coupons "shall not be satisfied or discharged except if and as may be expressly declared or provided by the committee".

Two paragraphs, particularly defining the title and powers which the committee was to have, declared:

"Seventh: Every depositor, for himself and not for any other, hereby sells, assigns, transfers and delivers to the Committee, its successors and assigns, each and every bond and coupon deposited hereunder by him, and also all his right, title, interest, property and claim at law, or in equity, by virtue of said bonds and coupons . . . and any and all his claims against the City or any receiver or receivers, or under any receivership of the City, 43 or any of its property, to the end that the Committee, as from time to time constituted, shall be vested with full legal title to

⁴³ [Footnotes renumbered.] The references to a possible receivership for the city and to enforcement of taxes dedicated to the payment of the bonds have explanation in laws of Texas permitting receiverships for cities in certain situations, and in other laws of that State requiring the governing body of a city before issuing its bonds to "provide for the levy and collection of a tax annually sufficient to pay the annual interest and provide a sinking fund for the payment of such bonds." Constitution of Texas, Article II, § 5; Baldwin's Texas Statutes, arts. 826, 1024, 1241–1258; Vernon's Ann.Civ.St. (Tex.), arts. 826, 1024, 1241–1258; City of Cisco charter, article 11, §§ 7, 9, and article 13, § 4; Chapter 46, Texas Gen.Laws of 1929, p. 80 (repealed by Act of March 13, 1931, c. 26, Texas Gen.Laws of 1931, p. 33). And see Bullard v. Cisco, 48 F.2d 212.

all the bonds and coupons deposited hereunder, and to each and every claim based thereon. . . .

"Eighth: The Committee may, as the owner and holder of the deposited bonds and coupons, demand, collect and receive all moneys due or payable thereon and may take or cause to be taken, or participate in or settle, compromise or discontinue, any actions or proceedings for the collection of any of the bonds or coupons or the protection, enforcement or foreclosure of any legal or equitable lien securing or pertaining to same, including liens arising from the enforcement of taxes, levies, and assessments dedicated, levied or available for the service of the bonds, or for the appointment of a receiver of the City or for any purpose whatsoever. The Committee may give such directions, execute such papers, and do such acts, as the Committee may consider wise or proper in order to preserve or enforce the rights or to advance or serve the interest of the depositors. . . "

Other paragraphs authorized the committee to purchase, acquire, sell or dispose of any property "which may be or become affected by any such lien, foreclosures, or taxes"; to borrow money for the purpose of making such purchases or acquisitions, discharging liens on property so purchased or acquired, or paying obligations and expenses of the committee, or for any other purpose of the agreement; and "to pledge all or any part of the bond and coupons deposited hereunder as collateral security for the payment of any such loan or loans."

There were also provisions relating to "a plan or plans for the refinancing, readjustment, liquidation or settlement of all of the bonds and/or other obligations of said city." 45 By these provisions the committee was authorized to prepare or participate in preparing such a plan and to include therein arrangements (a) for the purchase or acquisition of any properties or securities, the purchase or acquisition of which, in the opinion of the committee, would aid in advancing the interests of the certificate holders, and (b) for the "sale, exchange or disposition" of the "whole or any pro rata part of the deposited bonds and coupons." The plan was to be submitted to the holders of certificates of deposit, and each holder was to be taken as assenting thereto unless within thirty days he dissented in writing. If two thirds assented the committee was to be at liberty either to make the plan operative or to abandon it and submit another. If any plan from which there was a dissent was made operative the com-

⁴⁴ See note 43, supra.

⁴⁵ A law of Texas particularly authorizes the governing body of a city to "compromise and fund" its indebtedness and to issue new bonds on the basis of the compromise. Baldwin's Texas Statutes, arts. 828–834; Vernon's Ann. Civ.St. (Tex.) arts. 828–834.

mittee was required to return to each dissenting certificate holder "The bonds and coupons represented by his certificate," upon the surrender of the certificate and the payment by him of "an amount to be fixed by the committee"—which amount evidently was to be fixed on the basis prescribed in another provision soon to be mentioned.

The agreement further declared that the deposited bonds and coupons and all property purchased or acquired by the committee should be charged with the payment of the compensation, expenses, etc., of the committee; that any member of the committee might become "pecuniarily interested" in any property or matters which might be subject to the agreement or to any plan of readjustment; and that the committee should have authority to construe the agreement, and its construction thereof, made in good faith, should be conclusive and bind the holders of certificates of deposit.

It was also provided that the agreement should not remain in force beyond the period of five years from its date, unless extended by the committee with the consent of the holders of certificates representing a majority in amount of the deposited bonds and coupons; and that the committee, if considering it expedient, might terminate the agreement at any time by a vote of two thirds of its members and giving notice thereof to the certificate holders.

Upon the termination of the agreement the securities, cash and property held thereunder by the committee were to be distributed by the committee among the certificate holders according to the amount of deposited bonds and coupons represented by their respective certificates, but subject to and upon the condition that each certificate holder should pay his share, as fixed by the committee, of the compensation and expenses of the committee, its counsel, agents and depositary, and of all indebtedness, obligations and liabilities incurred by the committee.

From the evidence here outlined the District Court concluded (a) that under the agreement the committee (the plaintiffs) received the bonds and coupons merely as a collection agency and had no real ownership of them; (b) that of the owners who deposited their bonds and coupons with the committee only three were shown to have severally deposited more than \$3,000 of those sued on; and (c) that the particular bonds and coupons received from these three depositors were not in the evidence identified or segregated from the others. The court gave effect to its conclusions by sustaining the challenge to its jurisdiction and dismissing the suit without prejudice.

On an appeal by the plaintiffs, the Circuit Court of Appeals held that under the agreement the committee received and held the legal title to the bonds and coupons simply for purposes of collection and had no beneficial ownership; that the depositing holders remained the beneficial owners; that as to such of the bonds and coupons in suit as could not have been sued on by the beneficial owners, because their respective holdings were not in excess of \$3,000, the suit was not within the jurisdiction of the District Court and should have been dismissed; that as to such of the bonds and coupons in suit as could have been sued on by the beneficial owners, because their respective holdings were in excess of \$3,000, the suit "was not kept from being one within the court's jurisdiction by the fact that appellants (the committee) were vested with the legal title to those instruments simply for the purpose of collection"; and that, as the coupons in suit included three lots—each of more than \$3,000 and apparently susceptible of identification and segregation—which were received from depositing holders who could have sued thereon in the federal court, it was error to dismiss the suit in its entirety for want of jurisdiction without distinctly according to the plaintiffs an opportunity by evidence to identify and segregate the coupons received in the lots of more than \$3,000.

Thus, the Court of Appeals, while in the main approving the District Court's decision of the jurisdictional issue, pronounced its judgment of dismissal erroneous as to a minor part of the coupons sued on. For that error the judgment of the District Court was reversed with a direction for further proceedings conforming to the rulings of the Court of Appeals. 62 F.2d 313.

The plaintiffs, insisting that the suit in its entirety was within the District Court's jurisdiction, petitioned for certiorari, which this Court granted.

Under § 41(1), Title 28, U.S.C., 46 two things were essential to the jurisdiction of the District Court—one, that the suit be between citizens of different States, and the other that the sum or value in controversy, exclusive of interest and costs, be in excess of \$3,000. It was shown and not questioned that the parties—

⁴⁶ Sec. 41. The district courts shall have original jurisdiction as follows:

(1) First. Of all suits of a civil nature, at common law or in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, and . . . is between citizens of different States, . . . No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory notes or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made.

the plaintiffs on the one hand and the defendants on the otherwere citizens of different States. The suit was on bonds amounting to \$14,000 and coupons amounting to \$335,787.50—all payable to bearer, made by the defendant corporation and held by the plaintiffs—and recovery was sought of the full amount of these bonds and coupons. Thus both jurisdictional requisites were apparently present.

But it is urged that a part of that which made for such apparent jurisdiction was not real but colorable only, in that the plaintiffs had no actual ownership of the bonds and coupons sued on, but held them solely for purposes of collection on behalf of others who severally were the actual owners but unable to sue in the federal court since their respective claims were too small to satisfy the jurisdictional requirement. If this were all true the conclusion would follow that the suit was not properly within the jurisdiction of the District Court and should have been dismissed under § 80, Title 28, U.S.C.⁴⁷

On the other hand, if the transfers whereby the plaintiffs came to hold the bonds and coupons were not merely colorable or simply for purposes of collection, but were real and intended to invest the plaintiffs with the full title, even though in trust for purposes of which the transferrers ultimately would be the chief beneficiaries, it is quite plain that the plaintiffs could sue in the federal court notwithstanding the several transferrers, by reason of their small holdings, may have been unable to do so. With one accord prior decisions of this Court show that the right of a transferee of corporate bonds and coupons, payable to bearer, to sue in a federal court, notwithstanding a disability of his transferrers in that regard, turns on the nature of the transfer

⁴⁷ Sec. 80. "If in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

As examples of the enforcement of this provision, see Williams v. Nottawa, 104 U.S. 209; Bernards Township v. Stebbins, 109 U.S. 341, 354–356, 3 S.Ct. 252; Farmington v. Pillsbury, 114 U.S. 138, 143–146, 5 S.Ct. 807; Lake County v. Dudley, 173 U.S. 243, 252–254, 19 S.Ct. 398; Waite v. Santa Cruz, 184 U.S. 302, 325–329, 22 S.Ct. 327; Woodside v. Beckham, 216 U.S. 117, 30 S.Ct. 367. And see Crawford v. Neal, 144 U.S. 585, 593, 12 S.Ct. 759; Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 524, 48 S.Ct. 404.

whether it be real or only a colorable device to enable the transferrers, through the favor and name of the transferee, to invoke a federal jurisdiction which they could not invoke in their own right.⁴⁸

We are of the opinion that the purpose of the agreement of January 3, 1930, was not to create a mere collection agency, nor to set up a merely colorable devise for circumventing restrictions on federal jurisdiction, but to put the bonds and coupons—the owners of which were numerous and widely scattered-into an express trust—to be managed and administered by four trustees —for the purpose of conserving, salvaging and adjusting the investment—the municipal debtor having become financially embarrassed. The depositing owners, or succeeding certificate holders, were to be the cestuis que trustent or beneficiaries. The plaintiffs were to be the trustees. Although not called trustees in the agreement, they necessarily had that status by reason of the rights, powers and duties expressly assigned to them. There was a distinct declaration that they should have full title to the deposited bonds and coupons, and this was fortified by other provisions defining the control and power of disposal which the trustees were to have over them.

Counsel for the defendant inquire—If the committee were to be the legal owners of the bonds and coupons, why were they authorized to borrow money and pledge the bonds and coupons for its repayment, as also to do other things which legal owners would be free to do without special authorization. The answer is obvious. The title and authority confided to the persons constituting the committee were confided to them as trustees, and not in their personal right, and there was need for carefully and fully defining the authority; for trustees are not permitted to go beyond such as is given expressly or by necessary implication.

To summarize, we think it apparent from the agreement as a whole that resort to litigation was not the principal thing in mind when it was being made, and that what was intended was to invest the trustees with full title and such discretionary powers as might enable them to effect a helpful adjustment of the situation through refinancing, composition, exchange of securities and other means, including litigation if needed.

As the transfers under which the plaintiffs held the bonds and coupons were made to them as trustees, were real and not simply for purposes of collection, and invested them with the full title, they were entitled, by reason of their citizenship and of the amount involved, to bring the suit in the federal court. The bene-

⁴⁸ See cases cited in note 47.

ficiaries were not necessary parties and their citizenship was immaterial. 49

The judgments of both courts below must be reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Judgments reversed.

The Securities and Exchange Commission study, previously cited, concluded with the following paragraph (p. 125):

submit that regulation of the personnel and practices of protective committees in connection with municipal debt readjustments is absolutely essential. This conclusion is amply supported by the many instances cited of committees whose members have interests adverse to those of the investors whom they purport to represent; of committees whose mode of organization and subsequent activities are calculated to discourage the investigation and prosecution of possible causes of action in favor of bondholders or of the debtor; of committees which have profited extensively from their trust by voting themselves payments for expenses, compensation, and otherwise; of committees which have distributed patronage to attorneys, depositaries, secretaries, agents and others with a liberal hand; and of committees which, if not actively injuring investors, have found it possible, thanks to the usual ironclad deposit agreement, to do nothing for bondholders while milking their securities.

Note the suggestions of William O. Douglas, "The Legal Problem of Control over Protective Committees for Municipal and Quasi-Municipal Obligations" 2 Leg.Notes on Loc.Gov't 81 (1936).

See also George H. Dession, "Municipal Debt Adjustment and the Supreme Court" 46 Yale L.J. 199 (1936).

No legislation regulating protective committees has been enacted by Congress. Municipals are exempted from the application of the Securities Act. 15 U.S.C.A. § 77c (2). The Municipal Bankruptcy Act does have certain pertinent provisions. Under 11 U.S.C.A. § 403(b) no allowances of any character may be made to committees or other representatives of creditors except as may be provided for in the plan of composition. Section 403 (e) requires the judge to examine all proposals, deposit agreements and other papers relating to the plan and take evidence

⁴⁹ Dodge v. Tulleys, 144 U.S. 451, 455-456, 12 S.Ct. 728; Coal Co. v. Blatchford, 11 Wall. 172, 175; Knapp v. Railroad Co., 20 Wall. 117, 123-124.

under oath to determine whether the fiscal agent or any one else promoting the composition is to be compensated directly or indirectly by both the petitioner and creditors. If such a practice is found to exist the judge must dismiss the proceeding and tax the costs against the offending persons, or the petitioner unless the plan be timely modified to eliminate the possibility of any such practice.

As for state regulation, it is worthy of note that in a proceeding under the federal act by a New Jersey unit state law exacts that every allowance made in a plan of composition to representatives of creditors be approved in writing by the Municipal Finance Commission. N.J.Stat.Ann. 52:27–43 (West, Supp.1947).

For the most part state attacks upon the financial difficulties of local government have been piecemeal. Literally hundreds of statutes concerned with the subject were enacted during the 1930s. In some instances the local burden was eased by state assumption of public functions or services hitherto carried on at local expense. Thus, West Virginia took over secondary roads from the counties. State assumption of local debt, however, was negligible; constitutional provisions barred the way in many jurisdictions. State aid to local units and tax-sharing were increased in many states. Enabling statutes broadened local power to levy excises and exact service charges. There was a large volume of funding and refunding legislation. In Kansas and several other states cash basis laws authorizing funding of floating debt subject to future cash basis operation were adopted. Laws governing sinking fund administration were tightened. are but illustrations. Speaking generally, it can be said that the emphasis in some of this legislation was upon meeting the claims of creditors, in some upon the immediate survival objective of keeping local government going and in still other upon longrange rehabilitation. It remains to consider resort to state administrative supervision and control as both preventive and remedial devices. But first a word about obstructive legislation.

A number of measures, considered obstructive by creditor groups, were tried in Florida. A constitutional amendment, broad enough to cover debt service levies supporting outstanding bonds, exempted homesteads up to a valuation of \$5,000 from taxation. This was declared ineffective as to outstanding securities. Board of Public Instruction for Bay County v. State ex rel. Barefoot, 145 Fla. 482, 199 So. 760 (1941); State ex rel. Sovereign Camp, W.O.W., v. Boring, 121 Fla. 781, 164 So. 859 (1935). See, however, as to industrial exemptions, American Can Co. v. City of Tampa, 152 Fla. 798, 14 So.2d 203 (1943). By statute separate payment of operating expense and debt service taxes was au-

thorized. Local authorities were empowered to compromise delinquent taxes. This paved the way for collecting operating levies and compromising debt service taxes. Note the comment of bond counsel before the Securities and Exchange Commission reproduced in the protective committee study, cited supra, at 23–24. Another technique was to make bonds and matured interest coupons acceptable at par in payment of taxes. It was successfully attacked in the federal courts as an impairment of the obligation of bonds outstanding at the time the statute was enacted. Wall v. McNee, 87 F.2d 768 (C.C.A.5th, 1937).

Several states, notably New Jersey and North Carolina, in both of which defaults were heavy, have made significant and very hopeful provision for the use of state administrative machinery with the dual purpose of preventing local financial difficulties and affecting rehabilitation where preventive measures failed. In North Carolina, the Local Government Commission, exercises regular supervisory authority over local borrowing and sinking fund administration. (The latter is still important since much depression refinancing involved the issuance of term bonds to minimize the risk of defaults on the refunding issues.) The New Jersey Municipal Finance Commission exercises regular supervision over local budgeting and spending and employs sweeping temporary fiscal controls under conditions of default or certain other fiscal disorders.

We have seen that a judicial receivership is not well-suited to the situation of a general-function local unit in default on general obligations. An administrative receivership, however, is quite another thing. By its use problems of separation of powers could be avoided. To be effective the "receiver" would have to be in a position "to conserve assets" and be afforded, during the period of negotiation and adjustment, the benefit of a "stay" of individual creditor suits to enforce payment of particular claims. The draftsmen of the New Jersey act successfully met these requirements. Hourigan v. North Bergen Township, 113 N.J.L. 143, 172 A. 193, 785 (1934). The question remained whether a state composition law could make minority holders of pre-existing local obligations fish or cut bait. In 1942 the United States Supreme Court determined that, within limits, this could be done despite the contract clause of the Constitution. In the meantime the belief that it would take federal legislation to meet the problem of the dissenting creditor was a major influence in bringing about enactment of a federal municipal bankruptcy act.

Litigation bearing upon the validity of the federal enactments is discussed briefly in the opinion in the principal case which follows. It is now well established that an adjudication in bankruptcy and liquidation are not essential to the effective exercise of the bankruptcy power of Congress. Congress may provide a method of voluntary composition of debts which involves neither of those elements. Continental Illinois National Bank & Trust Co. v. Chicago, R. I. & P. Ry. Co., 294 U.S. 648, 55 S.Ct. 595 (1935). The view of some students of the subject that a municipality is not a fit subject for bankruptcy since "bankruptcy" postulates a debtor under control of the court "whose estate is at the disposal of his creditors" has not prevailed. See Garrard Glenn, Liquidation §§ 415-419 (1935). In holding the original act invalid the Supreme Court assumed that it dealt with a subject within the bankruptcy power but concluded broadly, four judges dissenting, that a proceeding under the act would encroach upon state sovereignty, even though entirely voluntary and authorized by state statute. The majority assumed, in effect, that there was an unconstitutional interference with state fiscal affairs to which a state could not consent, especially since the state statute would amount to an impairment of pre-existing contract obligations. Ashton v. Cameron County Water Improvement District, 298 U.S. 513, 56 S.Ct. 892 (1936).

The second act was drafted along lines which emphasized the composition of debts theory. Thus, while the original act required, in case of drainage and other conservation districts, plan approval by only thirty per centum of affected creditors at the time of filing the voluntary petition, the new act required fiftyone per centum in all cases. The Supreme Court upheld that statute in United States v. Bekins, 304 U.S. 27, 58 S.Ct. 811 (1938). State action authorizing local units to proceed under the statute was characterized as cooperation, not abdication. It may be doubted that the new provisions in the second act were controlling in the Bekins case. While the general principle that the Federal Government may not invade the state domain of control over local government was fully acknowledged by the Court, it may be urged that the cooperation theory of the Bekins case was likewise applicable to the first statute. So long as approval by a majority of affected creditors was made essential to jurisdiction to approve a plan, there is no evident constitutional necessity that there be majority approval or even a plan. at the time a petition looking to an ultimate composition of debts is filed. But see Giles J. Patterson, "Municipal Debt Adjustments under the Bankruptcy Act" 90 Univ. of Pa.L.Rev. 520, 525, et seq. (1942).

The 1937 act was adopted as a temporary emergency measure. Its life was extended from time to time down to June 30, 1946. By a statute approved July 1, 1946 Congress made the act a permanent part (Chapter IX) of the Bankruptcy Act. 60 Stat. 409. Only certain salient provisions of the measure will be outlined

here. The temporary law was confined to certain types of general function and special function local units endowed with the power to levy property taxes or assessments, or both. Only very limited jurisdiction with respect to revenue bonds was conferred. The permanent act greatly broadens the coverage to embrace debt-incurring local units and revenue bonds generally.

Any local unit within the sweep of the act may file a petition under it "stating that it is insolvent or unable to meet its debts as they mature." The petition must be accompanied by a plan of composition and state that creditors of the unit owning not less than fifty-one per centum in amount of the securities affected by the plan (exclusive of securities owned or controlled by the unit) have accepted it in writing. The plan may include provisions modifying the rights of creditors or any class of them either through the issuance of new securities or otherwise. The judge may not confirm a plan until it has been accepted in writing by creditors holding "at least two-thirds of the aggregate amount of claims of all classes affected" and which have been admitted by the unit or allowed by the judge.

There was incorporated in the permanent law a provision which imposes upon the court the duty of determining, before final decree shall be entered, that securities deposited by the unit for delivery to creditors have been lawfully authorized and will constitute valid obligations when delivered and that the provisions for payment are valid.

In 1942 a competent student of the subject expressed the opinion that the temporary act should not be renewed after June 30, 1942, on the grounds that the situation which provoked the enactment had largely been met and to continue the life of the law might invite deliberate defaults with a view to obtaining easier terms from creditors. Giles J. Patterson, op. cit. supra. at 532. Perhaps his fears are exaggerated. Is it likely that many units able to pay would jeopardize their credit by deliberate defaults? The federal courts administering the act are not apt to be insensitive to the interests of creditors. The petition, in any event, must be accompanied by a plan of composition approved in writing by fifty-one per centum in amount of the creditors affected. Instead, however, of standing on that requirement. there is reason to urge its elimination. Until the court takes jurisdiction there is, under the federal act, no way of staying individual proceedings by creditors and thereby holding things in statu quo to facilitate negotiation.

FAITOUTE IRON AND STEEL CO. v. CITY OF ASBURY PARK

Supreme Court of the United States, 1942. 316 U.S. 502, 62 S.Ct. 1129.

Mr. JUSTICE FRANKFURTER delivered the opinion of the Court.

A New Jersey statute, adopted in 1931, N.J.S.A. 52:27-1 et seq., authorized state control over insolvent municipalities. By a supplementary law, N.J.S.A. 52:27-34 et seq., enacted in 1933, a plan for adjustment of the claims of creditors of such an insolvent municipality could be made binding upon all creditors. The question is whether an adjustment so authorized by a state impairs rights in violation of the Constitution of the United States.

The City of Asbury Park is a seashore resort with a resident population of 15,000. It presents a familiar picture of optimistic and extravagant municipal expansion caught in the destructive grip of general economic depression: elaborate beachfront improvements, costs in excess of estimates, deficits not annually met by taxation, declining real-estate values, inability to refinance a disproportionately heavy load of short-term obligations, and, inevitably, default. Accordingly, in January, 1935, availing themselves of the New Jersey Municipal Finance Act, creditors applied to the Supreme Court of New Jersey to place the state Municipal Finance Commission in control of the city's finances.

The legislation was enacted "to meet the public emergency arising from a default in the payment of municipal obligations, and the resulting impairment of public credit", Laws of New Jersey 1931, c. 340, § 405, N.J.S.A. 52:27-65. In broad terms, the legislation, through combined administrative and judicial action, adapted the underlying principles of an equity receivership to the solution of the problem of insolvent municipalities. By a supplementing act, Laws of New Jersey 1933, c. 331, N.J.S.A. 52:27-34 to 52:27-39, a "plan of adjustment or composition of the claims of all creditors" may be submitted on their behalf to the supreme court of the state. If approved by 85 per cent in amount of the creditors and by the municipality and the Commission, such plan of adjustment may be adopted "if the court by its justice determines (1) that the municipality is unable to pay in full according to their terms the claims proposed to be adjusted or composed, and perform its public functions and preserve the value of property subject to taxation, (2) that the adjustment or composition is substantially measured by the capacity of the municipality to pay, (3) that it is in the interest of all the creditors affected thereby, and (4) that it is not detrimental to other creditors of the municipality." The plan cannot be authorized, however. if it involves any reduction of the principal amount of any

outstanding obligation. Any creditor is entitled to appear and to be heard, but a plan which is so authorized by the court is binding upon all creditors whether or not they appear, and the substitution of new obligations for old in carrying out the plan is made effective from the day fixed by judicial order. To effectuate such a plan, the Act provides further that the court shall retain jurisdiction and "thereafter no creditor whose claim is included in such adjustment or composition shall be authorized to bring any action or proceeding of any kind or character for the enforcement of his claim except with the permission of the supreme court and then only to recover and enforce the rights given him by the adjustment or composition." ⁵⁰

"The municipality and the commission shall be made parties to such proceeding. All creditors of the municipality shall be made parties thereto by notice to be published and given in such manner as the supreme court by its justice may direct. Any creditor of the municipality may appear and assert his rights.

"52:27-35. Allegations in petition. In the petition the creditors shall allege that the municipality is or will be unable to pay in full according to their terms the claims proposed to be adjusted or composed and perform its public functions and preserve the value of property subject to taxation, that the adjustment or composition proposed in the plan is substantially measured by the capacity of the municipality to pay, is in the interests of all the creditors affected thereby, and is not detrimental to other creditors of the municipality.

"52:27-36. Approval by supreme court justice of plan of adjustment or composition; findings. In any such proceeding, after hearing on the plan proposed or on the plan as modified by order and if such plan as proposed or modified is approved in writing by creditors representing eighty-five per cent in amount of the indebtedness affected thereby and by the municipality and the commission, the supreme court by a justice thereof may by order authorize and approve such adjustment or composition if the court by its justice determines (1) that the municipality is unable to pay in full according to their terms the claims proposed to be adjusted or composed, and perform its public functions and preserve the value of property subject to taxation, (2) that the adjustment or composition is substantially measured by the capacity of the municipality to pay, (3) that it is in the interest of all the creditors affected thereby, and (4) that it is not detrimental to other creditors of the municipality.

"52:27-37. Approved plan binding on all creditors; substituted obligations. The plan of adjustment so authorized and approved shall forthwith and without any further action of any kind be binding upon all the creditors included in the plan, whether or not they appear in the proceeding. In so far as said plan

⁵⁰ The text of the legislation as incorporated in N.J.Revised Statutes (1937), tit. 52. c. 27. indicates the careful character of the legislation:

[&]quot;52:27-34. Petition by creditors; plan of adjustment or composition; parties; notice. Upon the verified petition of any creditors of a municipality in which the commission shall function, made on behalf of themselves and all other creditors of the municipality, for the approval of a plan of adjustment or composition of the claims of all creditors or of a class or classes of them similarly situated, which plan shall be submitted with and made a part of the petition, the supreme court by a justice thereof may take jurisdiction of the subject matter and order the filing of the petition in the office of the clerk of the supreme court.

Pursuant to this legislative scheme, the City of Asbury Park was on March 7, 1935, placed under the control of the Municipal Finance Commission; on February 1, 1936, a plan for the refunding of its bonded debt was filed in the state supreme court, and that court took jurisdiction of the proceedings; the plan, as amended, was approved by the court on July 21, 1937; on September 28, 1937, it was duly approved by the Municipal Finance Commission; on April 29, 1938, it was consented to by creditors representing "85 per cent in amount of the indebtedness affected" by the plan; and on June 15, 1938, it was put into operation. The plan provided for the refunding of \$10,750,000 of outstanding bonds; these were to be exchanged by the consenting creditors for new bonds to be issued in accordance with the terms of the plan approved by the court.

The appellants were holders of defaulted bonds and interest coupons issued by the City of Asbury Park in 1929 and 1930—prior, therefore, to the legislation which authorized the proceedings resulting in the challenged refunding scheme. The bonds of the appellants were part of the \$10,750,000 of refunded bonds which, under the adjustment decreed by the court, could only be converted into new bonds maturing in 1966 and bearing a lower rate of interest than the original bonds. Deeming the arrangement authorized under the New Jersey statute to be violative of the Constitution of the United States, the appellants brought this suit for the face value of the old bonds and coupons. The Supreme Court of New Jersey dismissed the suit, 19 A.2d 445, 19 N.J.Misc. 322; the Court of Errors and Appeals affirmed the dismissal, 127 N.J.L. 239, 21 A.2d 796; and the case is here

provides for the substitution of any new bonds, notes or other obligations of the municipality in place of any outstanding bonds, notes or other obligations, or claims then outstanding, such substitution shall be effectual from and after such date as may be fixed in such order.

[&]quot;52:27-88. Continuance of stay of proceedings against municipality; action by creditor to enforce claim restricted. After the institution of any proceeding provided for by this article and pending the determination thereof, the supreme court by a justice thereof may by order continue the stay provided by sections 52:27-32.1 and 52:27-33 of this title.

[&]quot;In the event that a plan shall be authorized and approved pursuant to this article the court shall retain jurisdiction of such proceeding and thereafter no creditor whose claim is included in such adjustment or composition shall be authorized to bring any action or proceeding of any kind or character for the enforcement of his claim except with the permission of the supreme court and then only to recover and enforce the rights given him by the adjustment or composition.

[&]quot;52:27-39. Reduction in principal of outstanding notes or bonds prohibited. Notwithstanding any provisions of this article the commission shall not approve any adjustment or composition, or plan presented pursuant to this article, which provides for the reduction in the principal amount of any outstanding notes or bonds of the municipality."

on appeal under § 237(a) of the Judicial Code, as amended, 28 U.S.C. § 344(a), 28 U.S.C.A. § 344(a).

If the New Jersey legislation which is the foundation of the refunding plan for the City of Asbury Park is valid, appellants' claim on the old bonds was barred by law, and the judgment below must stand. The validity of that legislation is assailed on two grounds. It is contended, first, that the New Jersey laws constitute municipal bankruptcy legislation, that that field of lawmaking has been preempted by Congress, and that the New Jersey legislation is therefore inoperative. To this argument a few dates furnish a short answer. The present court proceedings began on February 1, 1936. The first federal Municipal Bankruptcy Act, 11 U.S.C.A. § 301 et seq. was declared unconstitutional on May 25, 1936. Ashton v. Cameron County Water Imp. Dist., 298 U.S. 513, 56 S.Ct. 892, 80 L.Ed. 1309. The refunding plan now assailed was approved, as we have seen, on July 21, 1937. It was thus authorized more than a year before the enactment of the only relevant federal statute, the Act of August 16, 1937, 50 Stat. 653, amending the Bankruptcy Act, 11 U.S.C.A. § 401 et seq. to provide for the composition of indebtedness of taxing agencies. Assuming Congress had power to do so, this Act did not profess to terminate a pending state court proceeding like that now in question. It would offend the most settled habits in the relationship between the States and the nation to imply such a retroactive nullification of state authority over its subordinate organs of government.

We prefer, however, to dispose of this objection on a broader ground. Not until April 25, 1938, was the power of Congress to afford relief similar to that given by New Jersey for its municipalities clearly established, United States v. Bekins, 304 U.S. 27, 58 S.Ct. 811, 82 L.Ed 1137, and then only because Congress had been "especially solicitous to afford no ground" for the "objection" that an exercise of federal bankruptcy over political subdivisions of the State "might materially restrict (its) control over its fiscal affairs" whereby states would no longer be "free to manage their own affairs". The statute was "carefully drawn so as not to impinge on the sovereignty of the State. The State retains control of its fiscal affairs. The bankruptcy power is exercised only in a case where the action of the taxing agency in carrying out a plan of composition approved by the bankruptcy court is authorized by state law." 304 U.S. at pages 50, 51, 58 S.Ct. at page 815, 82 L.Ed. 1137. New Jersey expressly prohibits any municipality to avail itself of a federal bankruptcy act "unless the approval of the municipal finance commission be first had and obtained". Revised Statutes of New Jersey (1937), 52:27-40, N.J.S.A. 52:27-40. The City of Asbury Park

has never attempted to resort to a federal bankruptcy court, and the New Jersey Municipal Finance Commission has not authorized it to do so. Can it be that a power that was not recognized until 1938, and when so recognized was carefully circumscribed to reserve full freedom to the states, has now been completely absorbed by the federal government—that a state which, as in the case of New Jersey, has after long study devised elaborate machinery for the autonomous regulation of problems as peculiarly local as the fiscal management of its own household, is powerless in this field? We think not.

This brings us to the second and main contention, namely, that the appellants' claims in the form of the bonds and coupons issued by the City of Asbury Park, constituted contracts, the obligation of which is impaired by the denial of their right to recover thereon and by their transmutation, without their consent, into the securities authorized by the plan of adjustment.

The principal asset of a municipality is its taxing power and that, unlike an asset of a private corporation, can not be available for distribution. An unsecured municipal security is therefore merely a draft on the good faith of a municipality in exercising its taxing power. The notion that a city has unlimited taxing power is, of course, an illusion. A city cannot be taken over and operated for the benefit of its creditors, nor can its creditors take over the taxing power. Indeed, so far as the federal Constitution is concerned, the taxing power of a municipality is not even within its own control—it is wholly subordinate to the unrestrained power of the state over political subdivisions of its own creation. "A municipal corporation . . . is a representative not only of the State, but is a portion of its governmental power. . . . The State may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence." United States v. Railroad Company, 17 Wall. 322, 329, 21 L.Ed. 597. And see Hunter v. Pittsburgh, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151.

In effect, therefore, the practical value of an unsecured claim against the city is inseparable from reliance upon the effectiveness of the city's taxing power. The only remedy for the enforcement of such a claim is a mandamus to compel the levying of authorized taxes. The experience of the two modern periods of municipal defaults, after the depressions of '73 and '93, shows that the right to enforce claims against the city through mandamus is the empty right to litigate. See Hillhouse, Lessons from Previous Eras of Default (chap. IV in Chatters, Municipal Debt Defaults); Report of the Securities and Exchange Commission on

the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees (1936), Pt. IV: Committees for the Holders of Municipal and Quasi-Municipal Obligations, passim; Dimock, Legal Problems of Financially Embarrassed Municipalities, contained in Summary of Proceedings, American Bar Ass'n, 1st Annual Meeting (1935), Section of Municipal Law, p. 12.

How, then, can claims against a financially embarrassed city be enforced? Experience shows that three conditions are essential if the municipality is to be kept going as a political community and, at the same time, the utmost for the benefit of the creditors is to be realized: impartial, outside control over the finances of the city; concerted action by all the creditors to avoid destructive action by individuals; and rateable distribution. In short, what is needed is a temporary scheme of public receivership over a subdivision of the state. A policy of every man for himself is destructive of the potential resources upon which rests the taxing power which in actual fact constitutes the security for unsecured obligations outstanding against a city.

To deny a state the means of giving substance to the taxing power which alone gives meaning to unsecured municipal obligations, is to hold in effect that the right to pursue a sterile litigation is an "obligation" protected by the Constitution of the United States. For there is no remedy when resort is had to "devices and contrivances" to nullify the taxing power which can be carried out only through authorized officials. See Rees v. City of Watertown, 19 Wall. 107, 124, 22 L.Ed. 72. And so we have had the spectacle of taxing officials resigning from office in order to frustrate tax levies through mandamus, and officials running on a platform of willingness to go to jail rather than to enforce a tax levy (see Raymond, State and Municipal Bonds, 342-43), and evasion of service by tax collectors, thus making impotent a court's mandate. Yost v. Dallas County, 236 U.S. 50, 57, 35 S.Ct. 235, 236, 59 L.Ed. 460. But if taxes can only be protected by the authority of the state and the state can withdraw that authority. the authority to levy a tax is imported into an obligation to pay an unsecured municipal claim, and there is also imported the power of the state to modify the means for exercising the taxing power effectively in order to discharge such obligation, in view of conditions not contemplated when the claims arose. Impairment of an obligation means refusal to pay an honest debt; it does not mean contriving ways and means for paying it. The necessity compelled by unexpected financial conditions to modify an original arrangement for discharging a city's debt is implied in every such obligation for the very reason that thereby the obligation is discharged, not impaired.

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More than fifty years ago, Lord Bryce pointed out that the debt and taxation of American cities had reached "an alarming figure". Bryce, The American Commonwealth, p. 607. Beginning with 1915, the evil consequences of the unhealthy financial conditions of New Jersey municipalities began to occupy the attention of its legislature. Investigations by expert bodies led to a series of enactments tightening state control over municipal finances. See Reports of New Jersey Legislative Commission for the Survey of Municipal Financing, 1915, 1916, 1917; Reports of New Jersey Commission on Municipal Taxation and Finance, particularly Report No. 2 (Municipal and County Debt, 1931). The depression intensified the need for state control, and the establishment of the Municipal Finance Commission with the powers outlined above were designed, as stated by the legislature, to meet "the public emergency arising from a default in the payment of municipal obligations, and the resulting impairment of public credit." But this emergency, as the decisions in this Court during the last ten years amply testify, did not evaporate. Students of the subject have pointed out that in the depression of 1893 as in that of 1873 "the worst financial difficulties for municipalities came in the fourth year of the depression". See Hillhouse, supra, at 14. History repeated itself, certainly as to New Jersey municipalities. See Report of New Jersey Municipal Finance Commission, 1937, and Second Annual Report of the Local Government Board (to which the functions of the Municipal Finance Commission were transferred in 1939), 1940, p. 11. The whole history of New Jersey legislation leaves no doubt that the state was bent on holding the municipalities to their obligations by utilizing the most widely approved means for making them effective. The intervention of the state in the fiscal affairs of its cities is plainly an exercise of its essential reserve power to protect the vital interests of its people by sustaining the public credit and maintaining local government. The payment of the creditors was the end to be obtained, but it could be maintained only by saving the resources of the municipality—the goose which lays its golden eggs, namely, the taxes which alone can meet the outstanding claims.

The real constitutional question is whether the Contract Clause of the Constitution Art. 1, § 10, bars the only proven way for assuring payment of unsecured municipal obligations. For, in the light of history, and more particularly on the basis of the recommendations of its expert advisers, the New Jersey legislature was entitled to find that in order to keep its insolvent municipalities going, and at the same time fructify their languishing sources of revenue and thus avoid repudiation, fair and just arrangements by way of compositions, scrutinized and authorized

by a court, might be necessary, and that to be efficacious such a composition must bind all, after 85 per cent of the creditors assent, in order to prevent unreasonable minority obstruction. As the court below pointed out, in view of the slump of the credit of the City of Asbury Park before the adoption of the plan now assailed, appellants' bonds had little value; the new bonds issued under the plan, however, are not in default and there is a very substantial market for them. The refunding scheme, as part of a comprehensive plan for salvaging Asbury Park, both governmentally and financially, was so successful that the refunding bonds were selling at around 69 at the time of refunding, while at about the time the present suit was brought commanded a market at better than 90. See Second Annual Report of the New Jersey Local Government Board, 1940, p. 39.

From time to time, ever since Sturges v. Crowninshield, 4 Wheat. 122, 199, 4 L.Ed. 529, it has been stated that a state insolvency act is limited by the Contract Clause of the Constitution in authorizing composition of preexisting debts. So it is, but it all depends on what is affected by such a composition and what state power it brings into play. The dictum from Sturges v. Crowninshield is one of those inaccurate generalizations that has gained momentum from uncritical repetition.

If a state retains police power with respect to building and loan associations, Veix v. Sixth Ward Building & Loan Ass'n, 310 U.S. 32, 38, 60 S.Ct. 792, 794, 84 L.Ed. 1061, because of their relation to the financial wellbeing of the state, and if it may authorize the reorganization of an insolvent bank upon the approval of a state superintendent of banks and a court, but over the dissent of one-fourth of the depositors (except preferred or secured claimants), Doty v. Love, 295 U.S. 64, 55 S.Ct. 558, 79 L.Ed. 1303, 96 A.L.R. 1438, a state should certainly not be denied a like power for the maintenance of its political subdivisions and for the protection not only of their credit but of all the creditors by an adjustment assented to by at least 85 per cent of the creditors, approved by the commission of the state having oversight of its municipalities, and found wise and just after due hearing by a court.

The Constitution is "intended to preserve practical and substantial rights, not to maintain theories." Davis v. Mills, 194 U.S. 451, 457, 24 S.Ct. 692, 695, 48 L.Ed. 1067. Particularly in a case like this are we in the realm of actualities and not of abstractions and paper rights, of what things are worth in dollars and cents, and in what is proposed to realize paper values. "The question whether the remedy on this contract was impaired materially is affected not only by the precarious character of the plain-

tiff's right, but by considerations of fact,—of what the remedy amounted to in practice." Pittsburgh Steel Co. v. Baltimore Eq. Soc., 226 U.S. 455, 459, 33 S.Ct. 167, 168, 57 L.Ed. 297. This was said of the claim of a creditor of a private corporation. How much more pertinent is it to claims of these appellants against the municipality of Asbury Park in the circumstances before us. ⁵¹ To say that the right of the Asbury Park bondholders in 1935 was a precarious character is pure understatement. And we have already seen how empty was the remedy with which to enforce that right.

"In the books there is much talk about distinctions between changes of the substance of the contract and changes of the The dividing line is at times obscure." Worthen Co. v. Kavanaugh, 295 U.S. 56, 60, 55 S.Ct. 555, 556, 79 L.Ed. 1298, 97 A.L.R. 905. The dividing line will remain obscure if we deal with empty abstract rights instead of worldly gains and losses, if we indulge in doctrinaire talk about "rights" and "remedies", instead of giving these concepts a content that carries meaning to the understanding of men. Here we have no such action as that disclosed in Worthen Co. v. Kavanaugh, supra, where with "studied indifference to the interests of the mortgagee or to his appropriate protection", legislation was found to "have taken from the mortgage the quality of an acceptable investment for a rational investor," and the challenged changes of remedy were found to be "an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security". Here we have just the opposite-no security whatever except the effective taxing power of the municipality; the effective taxing power of the municipality prostrate without state intervention to revive the famished finances of the

⁵¹ Compare Chicago, etc., Railroad Co. v. Nebraska, 170 U.S. 57, 72, 18 S.Ct. 513, 519, 42 L.Ed. 948. "Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms, without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject-matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the legislature when exercised to protect the public safety, health, and morals, and that clause of the federal constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that, when such contracts are entered into, it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature."

city; state intervention, carefully devised, worked out with scrupulous detail and with due regard to the interests of all the creditors, and scrutinized to that end by the state judiciary with the result that that which was a most depreciated claim of little value has, by the very scheme complained of, been saved and transmuted into substantial value. To call a law so beneficent in its consequences on behalf of the creditor who, having had so much restored to him, now insists on standing on the paper rights that were merely paper before this resuscitating scheme, an impairment of the obligation of contract is indeed to make of the Constitution a code of lifeless forms instead of an enduring framework of government for a dynamic society.

We do not go beyond the case before us. Different considerations may come into play in different situations. Thus we are not here concerned with legislative changes touching secured claims. The New Jersey courts have held that under this very statute tax anticipations and revenue notes stand on an entirely different footing from other municipal obligations and in relation to them no claim is affected by the Municipal Finance Commission Act of 1931. State v. Fort Lee, 188 A. 689, 14 N.J. Misc. 895. The differentiation thus made by New Jersey regarding various obligations in itself indicates the detailed care with which the legislation of the State proceeded in readjusting outstanding municipal obligations.

Affirmed.

MR. JUSTICE REED concurs in the result.

The question whether a non-resident minority creditor, who had not submitted to the jurisdiction, could be bound by the plan was not raised in the principal case. See Ogden v. Saunders, 12 Wheat. 213, 6 L.Ed. 606 (1827) and Canada Southern R. Co. v. Gebhard, 109 U.S. 527, 3 S.Ct. 363 (1883).

Congress included in the permanent municipal bankruptcy act a provision to the effect that no state law prescribing a method of composition of indebtedness of local units "Shall be binding upon any creditor who does not consent to such composition, and no judgment shall be entered under such State law which would bind a creditor to such composition without his consent. 11 U.S.C.A. § 403 (i) (Supp. 1947). This disables a state from building upon the constitutional groundwork laid in the Faitoute case. A state may provide its own machinery for local unit debt adjustment, which will serve through a period of negotiation, but minor-

ity creditors can be ultimately brought in line only by recourse to the federal machinery.

A state may, by statute, directly authorize local units to proceed under the federal act or it may grant that authority subject to the approval of a supervisory state agency. In New Jersey the unit must obtain the approval of the Municipal Finance Commission before filing a petition and the Commission's approval of a plan before it may be approved by the court or put into effect. N.J.Stat.Ann. 52–27–40, 52–27–42 (West, 1940).

The home rule problem raised by state administrative control of defaulting local units is discussed in Note 46 Harv.L.Rev. 1317 (1933).

Chapter 8

COMMUNITY PLANNING AND DEVELOPMENT

SECTION 1. THE PLANNING FUNCTION

It is desired at the outset of this chapter to project the subject of community planning and development on a very broad canvas. There is, at the same time, no disposition to slight the legal lore, which belongs to the subject. It is a matter of perspective and context. It is a matter of apprehending particular legal authority, limitations, forms and procedures in relation to the broad sweep and objectives of planning. Nor does local planning begin and end on the local plane. The student of the legal aspects of the subject will do well to bear in mind that one important problem of local planning is coordination with state, regional and national planning. Thus, municipal planning is affected by the state's master highway plan and its plans for the development of institutional properties, recreational facilities and airports. These are but a few of the more obvious state interests which affect local planning. The geographical, economic and social elements which distinguish this or that regional situation are likely to be much more vital conditioning factors in local planning than the artificial configuration of political boundaries. National plans for such facilities as public buildings, highways, airports, naval and military establishments and the congeries of navigation, power, irrigation, flood control and other projects associated with our waterways have a most important bearing upon local planning.

It must be evident that, in a just sense, government at any level would hardly deserve the name if it did not chart a course for the future, on at least a modest scale, in this or that area of responsibility. Planning in that sense embraces all the activities of organized society and goes well beyond the subject with which we are here concerned. That subject pertains to the physical development of a community whether through public or private improvements and uses. On the other hand, it seems to the writer that the concept of planning as a method or technique for making and protecting, through the exertion of the police power, of the location of public and private structures and uses is too narrow. See the discussion by Bassett and Williams in Bassett, Williams, Bettman and Whitten, Model Laws for Planning Cities, Counties and States 3 et seq. (Harvard City Planning Studies VII, 1935). The projection should go beyond what may be exacted under the

police power to embrace development to meet the need for community services which may require the cooperation of other agencies of government or of private parties or the exertion of other powers of government, notably, the power of eminent domain. Even in the narrower sense planning comprehends coordination and integration of various structures and uses. Its ultimate aim is the protection of human values so it should be conducted with keen sensitivity to those values and the economic and social forces affecting their realization.

"The city plan has three principal features. The first of these is a plan for the pattern of land uses throughout the city area. A second is a plan and program for community services to be provided by public and semi-public agencies. These two plans, the land use plan and the plan for community services, are usually coordinated by the development of a comprehensive 'master plan.'

"The Land Use Plan

"One of the very important parts of the city plan is the plan for land uses and their distribution throughout the community. In this, as in other parts of the city plan, what is really being planned is the pattern of activities of the human beings who reside and work in the city, but these human activities are influenced indirectly through control of the structures and other facilities that the inhabitants of the city use. The land use plan will determine within certain limits where people will live in the city, where they will work, and where they will shop. To the extent that it fixes the industrial, commercial, residential, and recreational areas it will have a very great influence upon the amount of time that the residents of the city spend in commuting and other travel.

"In the absence of a land use plan, economic forces will mold the city into a somewhat organized general pattern, with a considerable degree of segregation of different types of uses. In many respects, the effects of these economic forces are beneficial. In the competition for building sites those types of activities to which large numbers of the city's inhabitants require frequent access—stores, theaters, and other commercial establishments—will secure the favored locations that are central and convenient to transportation. Heavy industry will secure locations that give them the railroad and water transportation and other facilities that they need. These same economic forces will tend to balance the desire for central location against the crowding and congestion that this desire produces.

"In other respects, however, economic forces cannot be counted on to produce an entirely satisfactory pattern. The unplanned growth of cities under the stimulus of economic forces has not prevented an undue intermixing of incompatible types of land use, including the intrusion of industrial and commercial uses into residential areas. It often has permitted a degree of crowding that is detrimental to the social welfare of the community. Because of these, and other, defects in the land-use pattern of the unplanned community, it is clear that city planning is needed to prevent or remedy the developmental errors that will otherwise occur.

"Services and Facilities

"Secondly, the city plan will be concerned with the services and facilities that are provided for the inhabitants of the city by public and semipublic agencies: streets; railways, street railways, and busses; public buildings; recreational facilities; water, electric, and other utilities. Here too, it must be remembered that the city plan is ultimately a plan for people. The kinds of parks and other recreational facilities that the city provides and the program that it carries on with these facilities will help determine how the people of the city spend their leisure time. The streets and transportation facilities will be important in determining how much travelling they do in the city and how much of their time they must so spend. The relative competence with which gas and electric utilities are planned will determine in part what fuel the residents will use for cooking and for heating their homes and what it will cost them.

"These public service programs and the facilities that are required to make their provision possible are services that the community has decided must be provided for its inhabitants through common community action. There can be no question of leaving their development to unguided economic forces, since these forces are useful only in the coordination of the competitive activities of a multitude of individuals. Hence, the program of public services must be directed by the most comprehensive kind of planning. Moreover, the program for public services, and the pattern of service facilities that this plan requires, will be a very important force in directing and modifying the land use pattern produced by the economic mechanism. The kinds of public services and facilities the city provides in particular areas will affect decisively the desirability of these areas as industrial, commercial, and residential sites." Local Planning Administration 9-10 (Int'l City Mgrs' Ass'n 2d ed. 1948).

The following excerpts from the pamphlet "Local Planning and Zoning", issued in July, 1945, by the Bureau of Planning of the Department of Commerce of the State of New York provide a valuable introduction to our subject:

THE BACKGROUND OF PLANNING

The benefits to be derived from planning are so pronounced that it is surprising that planning has not been established as a regular function on all levels of government. The general reluctance on the part of various segments of our population to accept anything in the nature of planned development is probably one of the reasons for this situation. The background of the English planning movement has been analyzed by Mr. William A. Robson and the reasons appraised for its lack of conspicuous success during the first thirty years of its legislative existence.

Mr. Robson states, "The vast majority of the nation regarded town planning either as 'academic' (by which they meant impractical); or as uneconomic (by which they meant detrimental to profit-making or involving taxation); or as impossible (by which they meant opposed to inexorable natural laws prescribing the uses to which land is put); or as unimportant (by which they meant aiming at results beyond the scope of their imagination)."

Mr. Robson believes that the causes for these attitudes of mind "spring from a profound disbelief in the power of mankind to control its destiny, or even to shape its human environment. They derive from a feeling that when the future arrives it will be found to contain important factors which were not only unforeseen but unpredictable. In consequence, any plans which might be made will in the event be found unsuitable or inadequate."

In the years that have elapsed since the outbreak of the war, an extraordinary change has taken place in the mental climate of the English people on the question of town and country planning. It is observed that "for the first time the planning idea has suddenly become accepted as inevitable and necessary by large numbers of people belonging to all political parties and all classes of society.

"What are the reasons for this rapid conversion? In the first place there was the influence exerted by the strange phenomenon of evacuation. This included not only the exodus of millions of women and children, the old and the sick, from the more vulnerable cities, but the transfer of commercial offices and administrative institutions of all kinds from the large centres of population to country towns, villages and large country houses. Even a year or so before the war there were signs that the previous trends in regard to the location of industry were already undergoing a fundamental change under the shadow of the military menace. The great cities which had for so long been centres of attraction were losing their magnetic power.

"With all these striking changes in evidence it became impossible for even the dullest intelligence to believe that there is anything 'inevitable' or beyond human control in the way in which the population is distributed through the country; or that the unchecked growth of giant cities is part of the order of Providence.

"In the second place there is the indisputable fact that the damage wrought by bombing in many of our cities is on so extensive a scale that large-scale reconstruction will be required."

In conclusion, "There is the general influence of the realization that we cannot continue, even for the purpose of waging war, in our old planless ways: and if it is admitted that we must plan for war it is only a short step further to concede that we must also plan for peace.

"Above all there is the moral and psychological need for something to which the nation can look forward, an ideal to sustain it through the days of privation, endurance, sacrifice and suffering.

"This hope for the future has been provided by the idea of town and country planning. Wherever the destruction has been most severe, there men and women have resolved most seriously that when peace comes they will build a finer and a more beautiful city. The havoc which has been wrought in some places would be almost unbearable to those who have to live among it were they not aided by the vision of a fairer habitation in days to come. It is impossible to overestimate the value of vision, vague and unsubstantial though it doubtless is, as an aid to the maintenance of public morale. And every vision implies a plan. Indeed, a vision is a kind of plan, or at least it is the stuff of which plans are made. Without vision there can be no planning of any sort."

The consequence of these changes in moral and physical environment has been the establishment of a Ministry of Town and Country Planning in the British Government for the realization of these desires.

The past attitude towards the function of planning in this country is strikingly similar to the British experience as so admirably described by Mr. Robson. We have escaped the havoc and destruction wrought by bombing, but the need for city and town planning is nonetheless urgent. Congestion, blight and city decay are as destructive of human values as the ravages of war. Whether the necessity for community planning is recognized and the proper measures taken is a matter of community leadership.

The planning function can be performed by existing municipal departments or centralized in a local planning board. There are no legal barriers preventing the creation of such a planning agency. In fact New York State has been in the forefront in regard to the enactment of enabling legislation to facilitate and encourage planning and zoning. • •

ORGANIZATION OF BOARD

In a city or village the legislative body (usually the city council or village board) may create by resolution or ordinance a planning board of five members, to be appointed by the mayor or other appointive authority. Two of these must be officials of the municipality and the other three, lay members. The terms of the two officials expire with the term of the mayor selecting them, while the appointment of lay members is for overlapping terms of three years. The town board of a town may appoint a planning board of five members. Overlapping five-year terms are provided.

The appointing officials of the town, city or village are to appoint a chairman. If this is not done, the planning board may elect a chairman from its members. The appointive officials may remove any member of the planning board for cause and after a public hearing.

The members of the planning board need not necessarily be technically trained or professional planners. That they be persons of imagination, foresight and good judgment is of primary importance. Like other community organizations, if the planning board is to do its work well, its members must be willing to devote time and energy to its purposes. Secondary to these considerations, it is desirable that the board be broadly representative of community interests. For example, one of the city boards in this State is made up of a local real estate man, a representative businessman who is also a home owner in a good residential section, a representative of labor, the city engineer, and the corporation counsel. No broad general rules about the personnel of the board, other than those already indicated, can be laid down. Much must depend upon the local conditions and problems to be met.

The planning board has the power to employ experts and the necessary staff to do technical work as required, and to incur other necessary expenditures provided they are covered by funds made available for the board each year by the local appropriating authority.

The planning board can and should use available volunteer services of other groups and individuals. Many municipal and State departments have information or services which they will contribute. Many civilian volunteer groups can be organized and utilized for surveys and other work. By utilizing the services of other departments and groups much information can be gathered and services rendered at little cost to the planning board. In addition, a closer spirit of cooperation and a better

understanding of the work of the planning board can be developed.

BASE MAPS

Because much of the work likely to be undertaken by a planning board is closely related to the physical layout of the community, the preparation of a so-called "base map" early in the career of the board will be useful. This map is based upon a survey, the purpose of which is to show location of streets and roads, as well as railroads, other important means of transportation, principal lands in public ownership and such semi-public lands as cemeteries, airports and country clubs. If, as is often the case, existing maps are out of date, the cooperation of engineers in the local department of highways or of public works should be enlisted to bring the map up to date. In doing this, the use of insurance maps or other existing surveys may prove valuable. The base map should be on an easily legible scale but should not be so large as to be difficult to handle or to reproduce to scale. Usually, the scale of this map should not be greater than one inch equal to two hundred feet or smaller than one inch equal to eight hundred feet. Over-all size of the resulting map is the principal determinant, after legibility is assured. It will need to be handled considerably and its usefulness will partly depend upon its size. For large areas it may be necessary to prepare this map in two or more sections and then put them together when necessary. The map will need to be accurate as to scale although ordinarily not minutely so. Aerial maps can be useful as a beginning for a base map.

A base map can be valuable for presenting clearly a wide variety of information. Results of housing, transportation and most other surveys and reports frequently can be shown much more effectively on a base map than by other methods.

Other types of maps probably will be useful at various stages in the program of the board. These may include maps resulting from aerial photographs, topographic maps, soil and geologic maps. These and other maps, however, are not generally useful of themselves to a planning board, but only insofar as they are directed to important objectives of the board. Some boards may have to guard against a tendency of staff members to regard map making as an end in itself, a time consuming and expensive operation.

OFFICIAL MAP

The planning laws provide for an "official map" to be adopted by the local legislative body, and to be amended or added to by it at any time. The official map shows the streets, highways and parks already laid out, adopted and established by law. In this regard it is merely a map of existing conditions and is a kind of base map. The adoption of this map by the local legislative body merely makes official what is already in existence. But, once the map is adopted, changes in it, such as the addition of a new street, can be made only after a public hearing and reference to the planning board for reports thereon. The board must make its report within thirty days in order that its recommendations may be considered by the legislative body.

The official map is final and conclusive with respect to the location and width of streets and highways and the location of parks shown on it and should be the result of actual field surveys. It is a means of giving the local legislative body, upon advice of the planning board, control over the street and park layouts, and provides useful information as a basis for avoiding unnecessary streets or highways.

If an up to date official map of the community is not available, as is often the case, it is generally not the duty of the planning board to prepare this map. This requires engineering skill and is better done by engineers of the municipality. After it is once drawn up and adopted it can easily be kept up to date by the immediate recording of new additions or abandonments.

PREPARING THE COMMUNITY PLAN

The laws of the State provide that the planning board of a city, town or village may prepare a comprehensive master plan for the development of the entire area of the municipality. This plan serves as a basic pattern or framework for the future growth or development of the community much as the human frame serves an individual from infancy to maturity. As stated in the law, the "master plan shall show existing and proposed streets, bridges and tunnels and the approaches thereto, viaducts, parks, public reservations, roadways in parks, sites for public buildings and structures, zoning districts, pierheads and bulkhead lines, waterways and routes of public utilities and such other features existing and proposed as will provide for the improvement of the city (village or town) and its future growth. protection and development, and will afford adequate facilities for the public housing, transportation, distribution, comfort, convenience, public health, safety and general welfare of its population."

It is evident that the planning function and master plan encompass a wide range of activities. Although its obvious consequence is a physical expression of ideas, it represents more than a space arrangement of houses, industries, play areas and the required means of circulation. Its vital concern is people rather

than structures. Consequently, all the elements that shape human environment or affect individual well being influence the character of the proposals. Housing needs will be as much based upon a consideration of the incidence of disease, delinquency and other social factors, as upon a desire to improve the physical appearance of an area. Economic considerations also weigh heavily in the determination of community needs, or in satisfying group desires. The future growth or decline of a community, in fact, may be governed largely by economic factors as they affect industry, agriculture and commerce in the area.

At first, a planning board is likely to use much of the information it gathers to aid in the solution of a particular problem with which it is confronted at the time of its organization. As it directs its attention to the development of the master plan, however, much of the information obtained in connection with earlier problems is likely to be valuable also for this broader aim. The master plan should follow the best judgment of the members of the board based upon the results of its research and efforts at coordinaton combined with a thorough knowledge of existing conditions.

A master plan to be practical must be possible. In some instances boards have advanced financially impossible plans which have been discarded because of the inability of the community to muster the resources necessary for their realization.

Planning board members and professional planners have discussed at length the procedure to follow in developing a master plan. It is probable that there is no one best procedure, since an effective procedure normally would be expected to depend on the problems confronting the individual community. In preparing plans for major and minor highways, transportation systems, zoning and the like, proper relationships between the various elements of the community should be maintained. For example, in locating proposed new schools, attention must be given to the relation of present and probable future child population to the distance from homes to school; and in the location of industry, consideration should be given to transportation facilities, waste disposal, water supply and many other factors. In many phases of this work, not only the physical, but social and economic aspects of the problem must be given major consideration, as already mentioned.

In presenting the master plan, a series of maps will usually be useful, each showing a separate type of facility, such as highways, parks and playgrounds, and transportation routes. The maps can be prepared on tracing cloth in such a way that they can be superimposed one upon another to show relationships of needed

improvements to such factors as population density, tax delinquency, assessed valuation and the like.

As a part of the program dealing with the master plan as well as with other projects, it is desirable to work out with the responsible local officials a long range financial program showing how the municipality may finance the plan. Such attempts at budgeting have the advantage both of keeping the planning board's program within reasonable bounds and of recommending to local officials projects which are within the ability of the community to finance.

Some planning boards have the misconception that their primary function is to promote public improvements. This may be true in a particular instance such as the elimination of a dangerous grade crossing, but the principal function of the planning commission is that of guidance in public improvements, if and when such improvements commonly occur, and not the promotion of such projects. The success of a plan is to be measured more by whether it is observed in the normal addition of public improvements than by the speed with which the recommendations are carried out. Too much emphasis upon the number of costly improvements made, as evidence of successful planning, has caused too many planning commissions to be looked upon as accepted luxuries.

HOUSING IN THE COMMUNITY PLAN

Housing occupies an important place among the factors which shape the character of a community. Areas of blighted or obsolescent housing foster progressive community deterioration. The erection of additional housing facilities in more desirable neighborhoods or locations is accompanied by a movement of population from the depressed and other areas. The resulting lack of balance among the necessary community services is accentuated; or, if such unbalance already exists, its effects are intensified.

It is evident that housing is one element in the basic development pattern. Good neighborhoods can be planned only as parts of the entire urban community. Housing developments, both public and private, must be sited and designed to provide: (1) desirable open space; (2) protection against heavy traffic and encroachment of harmful uses; (3) facilities for shopping; and (4) the educational, recreational, cultural and related services that make for a stable and satisfactory community life. These requirements can be met only by integrating the housing needs of a community with the other elements of the municipal plan. Housing, consequently, is a part of the larger task of planning.

PUBLIC RELATIONS

Merely drawing up and maintaining a master plan or other project does not, by any means, complete the work of the planning board, nor does it assure that the plan will be carried out. The neatest plans of the most earnest planners, like those of other men, often undergo drastic changes on their way from drafting boards to the legislative committees and desks of municipal executives. It is all too frequently the case that planners lacking in executive experience and political acumen seek refuge in that substitute for action, endless research. Consciences too frequently have been lightened with the consolation that an elaborate research ritual is necessary to produce plans which somehow have never appeared.

It, therefore, cannot be over-emphasized that the drawing of plans should be considered as a basis for action. While these plans represent the combined judgment of members of the planning board, acceptance by the public and their representatives will not be gained merely on this account. Long and patient effort in persuading local people and their officials will ordinarily be necessary if the recommendations of a planning board are to be embodied in stone and concrete or in personnel to furnish needed services.

To be effective in its work the planning board must, first of all, command the respect and confidence of the authority under which it operates, namely, the town board, village board or city council. One way in which to develop such confidence is to perform work useful in the present generation and relating to recognized problems. The legislative body should be made thoroughly familiar with the aims and objectives of the planning board and encouraged to refer matters pertinent to planning and zoning to the planning board before taking action. If this is done, the effectiveness of both boards will be materially increased, and the status of the planning board will be on a firmer foundation.

In this connection it should be noted that in establishing a planning board the local legislative body loses none of its authority or power of final decision in relation to public works or other municipal affairs. Instead it gains, through the planning board, added control of land subdivision by private developers who otherwise are subject to little or no municipal control. It also secures technical, comprehensive assistance in obtaining facts to aid in the solution of a large number of other problems over which the legislative body has jurisdiction.

Few means of acquainting the public with the program of the planning board should be overlooked. It goes without saying

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that the members of a planning board should maintain close relations with political and civic leaders of the community, local governmental department heads, newspaper men, women's clubs, school leaders, industrial and labor leaders and the like if their confidence and support is to be won.

It is particularly important that close relationships be maintained with heads of various departments of the local government, since many of the plans made deal with matters within the jurisdiction of one or another of these departments, and their cooperation in preparing and carrying out the plans is essential.

Citizens' groups usually have a membership representative of many diverse elements in the community. Through these groups such as service clubs, fraternal orders, women's clubs, youth organizations and the like, it is possible to reach large numbers of local citizens and to inform them of what the planning board is attempting to achieve.

The members of the planning board should maintain agreeable relationships with the local press. Other possibilities for publicizing the program of the board are numerous and should not be neglected. These include exhibits which may be shown in public places, attractively presented reports, making available speakers and, if the purpose warrants the expense, preparing slides or movie shorts.

The ultimate success of the planning board's program, if soundly conceived, depends upon good public relations, since popular approval must be obtained to put the program into action. The board, therefore, should consider acquainting the public with its aims and purposes as one of its most important problems.

APPROVAL OF PLATS

The legislative body creating the planning board may also authorize and empower it to approve plats showing new streets or highways. A plat is a plan for developing a piece of undeveloped property.

The planning board generally should be given this power. When granted such authority, it may adopt regulations for the guidance of subdividers. It must hold a public hearing on each subdivision plat, and may thereupon approve, modify and approve or disapprove such plats. The State Bureau of Planning has available standard subdivision regulations suitable for adoption by planning boards in New York State. These have been published as Bulletins 39, 40 and 41 for the use of towns, villages and cities respectively.

Requirements for Approval of Plats

Among the planning board's requirements for the approval of plats are that streets and highways shall be of sufficient width, suitably located and graded, coordinated with the existing street system and properly related to proposals shown on the master plan. Another important requirement is that the land shall be suitable for building sites and of such a character that it can be safely used without danger to health or peril from fire, flood or other menace. The planning board may insist that the subdivider shall suitably grade and pave all streets or other public places shown on such plats, and install sidewalks, street lighting standards, curbs, gutters, street trees, water mains, sanitary sewers and storm drains all in accordance with standards, specifications and procedures acceptable to the appropriate municipal department. The planning board may also require that a park or parks suitably located and of reasonable size for playground or other recreation purposes be provided in the development layout. As an alternate procedure, the subdivider may furnish the city, village or town a performance bond sufficient to cover the full cost of these improvements. Under certain conditions and subject to appropriate safeguards the planning board may waive, for such period as it may determine, the installation of such improvements.

The power to control plats is one of the planning commission's most effective tools for lending force to its plans. In the absence of a planning board, platting control authority rests with the municipal governing body. The planning board made up of citizens interested in the future of the community should have the time and the staff to do more thorough work and should be less subject to the activities of community pressure groups than the governing body. Platting control also should be guided largely by the long-range plans of the planning board since additions of new subdivisions involving new streets, buildings and parks will materially affect this plan. Both planning and control of plats should, therefore, rest in one agency.

Two important prerequisites for effective and intelligent land subdivision regulation and control are a comprehensive plan of development and a set of platting rules and regulations. The comprehensive plan, or master plan, has been previously discussed. In regard to platting rules and regulations a few general considerations may be outlined.

A statement of procedures to be followed by the land subdivider in submitting a plan and map for approval should be outlined. Among other requirements, two important steps should be provided: (a) the subdivider should be required to submit a preliminary plat map, subject to adjustment or conditional approval by the planning board; and (b) the subdivider should be required to submit a final plat map which should show any changes in such preliminary map as has been specified by the planning board.

The board should prepare a list of engineering data and other information which the subdivider is required to show on both the preliminary and final plat map. These requirements should be such that the subdivider will have to use available topographic information in making his plan. This will often later prevent useless and wasteful expenditures in connection with sewer and water systems. The feasibility of all the development features should be clearly shown. The location and dimensions of all streets, lots and other areas shown on the plat map should be such that they may be readily checked in the planning board's office and on the ground. The relationship of the subdivision to neighboring properties should also be shown together with the names of neighboring owners.

A list of standards to be required should be included in the rules and regulations. This may include statements as to minimum and maximum allowable block dimensions, minimum and maximum allowable street grades and so forth.

A list of special requirements should also be included. These may include improvements to be installed by the land subdivider, provision to be made for drainage, and number and location of permanent monuments.

It should be pointed out here that State and Federal standards have been set up and at present, conformity with the Underwriters Manual of the Federal Housing Administration is practically mandatory in many cases.

A word of caution should be included to the effect that standards should not be set that will defeat the objectives of good planning. For example, some of the subdivision regulations specify that there shall be no "dead end streets." Other regulations have said, "All streets shall be continuous; every street shall have two sidewalks." In contrast to this the modern planner feels that, for example, only main thoroughfares need be continuous. Residential streets are better broken than made direct in order to discourage through and fast traffic in residential neighborhoods. A dead end street, if ample turn around space is provided at the end, often affords the best service to residential sites.

Special effort should be made to discourage the all too common practice of dividing land into very small lots, with twenty or twenty-five foot frontage, with the idea of selling many more lots than could otherwise be sold. Adequate zoning restrictions spec-

ifying, for example, allowable number of families per acre, will help this problem.

Premature land subdivision caused by speculative development of land has become a serious problem in many localities. This leads, not only to excessive costs to the municipality for public improvement such as streets and sewers, but also to a high rate of tax delinquency for vacant lots in these premature subdivisions. Studies made by the New York State Planning Council show that the number of tax delinquencies increased over the period of the study directly with the degree of prematurity of land development.* In the interests of both the community and the subdivider, the planning board should by persuasion and by requiring specified public improvements to be added by the subdivider, try to discourage such premature subdivision. It is not within the province of the planning commission to deny a property owner the right to subdivide his land, but they can attempt to guide the subdivider in the proper and efficient handling of his land. They can also refuse to approve subdivisions which are considered unsafe because of flood hazards, bad drainage or other unusual topographical conditions.

Planning boards should recognize that not all violations by subdividers are done with willful intent. Sometimes they are due to ignorance of proposed plans and of public desires. One of the principal functions of the planning board should be to acquaint each subdivider with existing development plans and gradually to acquaint him with better subdivision practices. This is generally not as difficult as it appears, because by intelligent planning, as many lots often can be laid out, with added advantages, as could be obtained by a layout similar to the old "gridiron" pattern. For example, with the universal use of the automobile, longer blocks can be laid out and the consequent saving in space for side streets can be converted into park space or larger building lots.

Engineering knowledge and technical skill should be made available to the planning board either through a loan of the services of an engineer from another municipal department or through adding engineering personnel directly to the planning staff.

Planning Board May Amend Zoning Simultaneously With Approval of Plat

The planning board may, when approving a plat and after a public hearing, make any reasonable change in the zoning regulations to have them conform with the plat of a new subdivision,

^{*&}quot;Problems Created by Premature Subdivision of Urban Lands in Selected Metropolitan," by Philip H. Cornick, 1938.

provided this authority is given by the legislative body. They may also permit variations in density of population in accordance with a building plan submitted by the owner, provided the resulting average density shall not exceed that permitted under the zoning regulations. This does away with the necessity of the local legislative body holding hearings and amending the zoning ordinance for a particular subdivision. Instead, the planning board can use its best judgment along the lines of the plan for the future development of the community, and apply the existing zoning ordinance to the new subdivision without having to go through the complicated procedure of amending the ordinance.

Recording of Plats

When the planning board has been given control over subdivisions, no plat of a subdivision can be filed in the office of the County Clerk or register until it has been approved by the planning board and the approval endorsed on the plat. Every street on such a plat then automatically becomes a part of the official map of the municipality, if such a map has been adopted, but remains a private street until it is formally accepted as a public street by the local legislative body. Approval of a plat map by a planning board has the effect of official acceptance of the location of the streets and other public areas shown thereon, but does not obligate the governing body to assume responsibility for improving or maintaining such streets or other public property. The legislative body thus does not lose authority by delegating the powers to a planning board but, instead, it gains the advantage of receiving advice from a board with experience in handling such details.

Restrictions Against Building in Mapped Streets

To preserve the integrity of the official map, if one is adopted, no permit may be granted for the erection of a building in the bed of any street or highway shown on such map except as the board of appeals, or other similar board having power to grant exceptions to zoning regulations, may after a public hearing grant a variance for the erection of such a building to avoid undue hardships to the owner. In any case, the variance should be such as will increase as little as possible the cost of opening such a street or highway.

Utilities in Streets

The law states that no public municipal street utility or improvement shall be constructed by the municipality in any private street. It further states that no permit shall be issued for the

erection of any building unless a street or highway giving access thereto has been incorporated in the official map. Exceptions to the latter may be made by the board of appeals, or similar body, under the procedure described above for dealing with a building in the bed of a mapped street.

The purpose of this restriction is to prevent building on a private street, because the buildings usually need municipal services such as water and sewer mains. When building is prevented on such a street, pressure is often brought to bear upon the local legislative body to change the street to a public street. This, if done, often involves unjustifiable expense to the municipality to provide services for but a few buildings.

In a town, the town board may permit a subsurface utility or improvement operated in a private street, provided a suitable public easement is obtained. For example, a water supply system may be extended to serve additional homes which would bring in revenue to the town. If there is no official map or plan of the town, building permits may be issued for a building under certain conditions. The building must have access upon an existing public highway or street. If a new street, the street must appear on a subdivision plat approved by the planning board, or on a plat duly filed and recorded before the appointment of the planning board and the grant to it of the power to approve plats.

Planning organization and administration should be responsive to the prevailing conception of the planning function. There is a growing body of opinion which holds that planning is an essential continuing function of local government. Thus, while the independent planning commission, the New York version of which is described in the foregoing material, is still the prevalent form of organization, there are those who think that there should be a regular planning department in the executive branch, responsible to the chief executive. Local Planning Administration 35 et seq. (Int'l City Mgrs' Ass'n, 2d ed. 1948).

Data compiled in 1947 disclosed that state planning of development organizations existed in forty-five states, although some twelve states had no active planning program. The Book of the States 1948–49, 269–273 (The Council of State Governments—1948). A well-staffed state planning agency can be of great assistance to the smaller local planning units by furnishing seasoned counsel, data, comparative materials and technical services. Financial aid may also be granted as a very concrete encouragement to local planning. State review and control of local plan-

ning, to the extent necessary to effect coordination with the state master plan, would appear appropriate.

The Municipal Year Book 1948, issued by the International City Managers' Association, reported (at p. 247) that of 946 cities reporting out of 1072 over 10,000 population, 617 had regular official planning agencies. Only 164 had full-time planning staffs. Forty-five per centum of the 586 between 10,000 and 25,000, which reported, had official agencies and twenty-five per centum had unofficial bodies. In the 1946 Year Book it had been reported that over half the 1,072 cities of over 10,000 had master plans which had either been completed or were yet in preparation. The detailed report disclosed that relatively few had actually been completed. Metropolitan or regional planning was widespread but the extent and quality of municipal participation was not revealed.

Rural and agricultural planning, which is a function of county and regional planning agencies, has been actively conducted in some states, notably Wisconsin, but has not generally gained much headway. A crucial factor is coordination with urban planning. The urban fringe is within the functional sweep of urban planning but political and practical difficulties may dictate the vesting of legal control in county or regional agencies.

A number of leading educational institutions are giving specialized training in community planning. Persons so trained are finding professional employment on public planning staffs (no doubt, many city managers also have had planning training) or in association with private firms of planning engineers and consultants. It is encouraging that there is sensitivity to the educational responsibility of providing technically competent people in the field.

The literature of planning has grown to large proportions. Good selected bibliographies on local planning will be found in the Municipal Year Book 1948, at 258 et seq., and in Local Planning Administration, at 323 et seq. (Int'l City Mgrs' Ass'n, 2d ed. 1948).

HEADLEY v. CITY OF ROCHESTER

Court of Appeals of New York, 1936. 272 N.Y. 197, 5 N.E.2d 198.

LEHMAN, J. The plaintiff since 1918 has been the owner of premises in the city of Rochester which are bounded on the south by East avenue and on the west by North Goodman street. East avenue and North Goodman street have been, for more than twenty years, public streets or highways. In 1931, pursuant to article 3 of the General City Law (Cons. Laws, ch. 21), the Council of the

city of Rochester passed an ordinance which amended, changed and added to an official map or plan previously adopted by the Council "so as to correct and revise said established Official Map or Plan and to lay out new streets and highways and to widen existing highways." In that map or plan the southerly twenty-five feet of plaintiff's said premises are included in East avenue, as widened, and a strip of plaintiff's premises extending along its westerly edge is included in North Goodman street, as widened. The plaintiff has brought an action to obtain a judgment declaring "that the ordinance and map and plan adopted by the said City of Rochester as aforesaid is unconstitutional and void." At Special Term the complaint was dismissed. The Appellate Division reversed and granted judgment "declaring that the ordinance, map and plan herein involved, are void and ineffectual to create any limitations or restrictions upon the use or conveyance of plaintiff's property."

By chapter 690 of the Laws of 1926 the Legislature added article 3, entitled "Official Maps and Planning Boards," to the General City Law. That article empowers the legislative body of every city to establish an official map or plan of the city showing the streets, highways and parks theretofore laid out and established by law. (§ 26.) It empowers such legislative body "whenever and as often as it may deem it for the public interest, to change or add to the official map or plan of the city so as to lay out new streets, highways or parks, or to widen or close existing streets, highways or parks." (§ 29.) It further empowers the legislative body of the city to create a planning board of five members and it requires that before making any addition or change in an official map in accordance with section 29 "the matter shall be referred to the planning board for report thereon." The planning board is given "power and authority to make such investigations. maps and reports and recommendations in connection therewith relating to the planning and development of the city as to it seems desirable." (§ 31.)

The adoption or revision of a general map pursuant to the provisions of the General City Law does not have the effect of divesting the title of the owner of land in the bed of a street as shown on the map; it does not have the effect of divesting the title of the owner of land in the bed of a street as shown on the map; it does not have the effect of placing upon the city a duty to begin, presently, condemnation proceedings to acquire such land. Article 3 of the statute provides the machinery for intelligent planning in advance for the needs of the city as the city is expected to grow in the future. Only time can prove whether the city has wisely gauged the future, and the city is under no compulsion to open

any street shown on the map unless and until the legislative body of the city decides that it is actually needed.

The mere adoption of a general plan or map showing streets and parks to be laid out or widened in the future, without acquisition by the city of title to the land in the bed of the street, can be of little benefit to the public if the development of the land abutting upon and in the bed of the proposed streets proceeds in a haphazard way, without taking into account the general plan adopted and, especially, if permanent buildings are erected on the land in the bed of the proposed street which would hamper its acquisition or use for its intended purpose. So long as the owners of parcels of land which lie partly in the bed of streets shown on such a map are free to place permanent buildings in the bed of a proposed street and to provide private ways and approaches which have no relation to the proposed system of public streets, the integrity of the plan may be destroyed by the haphazard or even malicious development of one parcel or tract to the injury of other owners who may have developed their own tracts in a manner which conforms to the general map or plan.

A statutory requirement that a city must acquire title to the land in the bed of the streets shown on the general map or plan. and provide compensation for the land taken, would create practical difficulties which would drastically limit, if, indeed, they did not render illusory, any power conferred upon the city to adopt a general map or plan which will make provision for streets which will be needed only if present anticipations of the future development of the city are realized. On the other hand, to leave the land in private ownership, and, without compensation to the owner, incumber it with restrictions upon its use which would result in diminution in its value might be inequitable and perhaps even beyond the power of the State. To meet the difficulty, the Legislature has provided in section 35 of the General City Law that "for the purpose of preserving the integrity of such official map or plan no permit shall hereafter be issued for any building in the bed of any street or highway shown or laid out on such map or plan. provided, however, that if the land within such mapped street or highway is not yielding a fair return on its value to the owner. the board of appeals or other similar board in any city which has established such a board having power to make variances or exception in zoning regulations shall have power in a specific case . to grant a permit for a building in such street or highway which will as little as practicable increase the cost of opening such street or highway, or tend to cause a change of such official map or plan, and such board may impose reasonable requirements as a

condition of granting such permit, which requirements shall inure to the benefit of the city." The sole complaint of the plaintiff is

that so long as that section remains in force the effect of the ordinance adopted by the city is to restrict the use to which the plaintiff may put his land in the bed of the street and to that extent constitutes a taking of his property, and that, since the city is not required to pay any compensation to him unless or until at some time in the indefinite future it may choose to take title to the land, the effect of the ordinance is to deprive him of his property without due process of law.

Not every restriction placed by authority of the State upon the use of property for the general welfare of the State, without payment of compensation, constitutes a deprivation of property without due process of law. This court has sustained a reasonable restriction upon the height of signs on roofs, saying: "Compensation for such interference with and restriction in the use of property is found in the share that the owner enjoys in the common benefit secured to all." (People ex rel. Wineburgh Adv. Co. v. Murphy, 195 N.Y. 126, 131, 88 N.E. 17.) Under the provisions of the General City Law the owner of land in the bed of the street shown in a map remains as free to alien the land or to use it as he sees fit as he was before the map was adopted, except in one respect. If he desires to improve the property by erecting a building for which a permit is required, the grant of such a permit is surrounded by drastic conditions or restrictions which will in many cases act as an obstacle to such use of the land.

In Junius Constr. Corp. v. Cohen (257 N.Y. 393, 399, 178 N.E. 672), though the appellant attempted to question the constitutionality of section 35 of the General City Law, we placed our decision on other grounds and said: "We find it unnecessary to determine whether section 35 with its restrictions upon the enjoyment of the land within the boundaries of a mapped street is an unconstitutional interference with vested rights of property. (Cf. on the one hand, Forster v. Scott, 136 N.Y. 577, 32 N.E. 976: Matter of Wall Street, 17 Barb. 617, 636; People ex rel. N.Y.C., & H. R. R. R. Co. v. Priest, 206 N.Y. 274, 99 N.E. 547; Edwards v. Bruorton, 184 Mass. 529, 69 N.E. 328; and on the other hand, Matter of City of New York, 196 N.Y. 255, 89 N.E. 814: Matter of Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120; Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114.)" Though the section has been on the statute books since 1926, its validity has not been challenged in any other case in this court. It is perhaps not without significance that during these years no owner has claimed that the statute has actually interfered with his enjoyment of the land, or has prevented him from obtaining a permit to improve the land in a manner which he deemed desirable.

The plaintiff in this case, too, makes no such claim. The complaint alleges only the conclusion of the pleader that by reason of the filing of the ordinance and map or plan "the plaintiff has been, and is, deprived of his property without the payment of compensation therefor." The complaint is silent as to how the plaintiff is injured by the ordinance and the map. The stipulation of the facts upon which the case was submitted for decision again fails to indicate in what manner the ordinance has caused damage to the plaintiff or interferes with any use to which the plaintiff desires to put the land. On the contrary, it appears from the stipulated facts that "the plaintiff has at present no plans for the use of said premises nor any particular desire as to the purposes for which he expects to use the same" and "that the plaintiff, because of the claim of the defendant under said ordinance and map, is undecided as to whether he shall endeavor to build upon said premises or endeavor to sell the same." It may be added, incidentally, that the stipulated facts fail to show that there is at present any actual controversy with the city as to the use to which the property may be put, and it appears "that the plaintiff has made no application to the Planning Board, Board of Appeals or Supervisor of Zoning of the City of Rochester for a permit to use those portions of his property included in said map as widened streets or to build thereon or to alter any existing structures therein."

Regardless of the form of action in which relief is sought, the courts will not declare a statute unconstitutional unless and until such relief is necessary for the protection of some right of the suitor guaranteed by the Constitution. "The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it." (California v. San Pablo & Tulare R. R. Co., 149 U.S. 308, 314, 13 S.Ct. 876.) "To complain of a ruling one must be made the victim of it. One cannot invoke to defeat a law an apprehension of what might be done under it, and, which if done, might not receive judicial approval." (Lehon v. City of Atlanta, 242 U.S. 53, 56, 37 S.Ct. 70.)

The courts have sustained, as a proper exercise of the police power, restrictions in zoning ordinances upon the use of land in defined districts which go so far as to require that all buildings be set back a specified distance from the street. (Matter of Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120.) There the restrictions were imposed to promote the general welfare and to protect the public health and safety. Here it may be urged that the restrictions, though less drastic, also affect less directly, if at all, the general welfare or the public health and safety. Even if some doubt may remain whether the State has power to impose present

restrictions upon the use of land in the bed of a street as shown on an official map or plan, without compensation for the damage caused to the owner of land by reason of such restrictions, there can be no doubt that such restrictions are calculated to promote at least the public convenience if not the public health, and to benefit the district in which the land is situated, as well as the city itself; and that insofar as such restrictions may constitute a taking of property, the taking would be for a public purpose and would accord with "due process of law" if compensation were paid for the consequent damage. Since the plaintiff's alleged grievance is that he has been deprived of his property without compensation, the grievance becomes illusory if it does not appear that damage has been done him by the city's acts.

A statute cannot have the effect of depriving a person of his liberty or property unless it prevents such person from doing an act which he desires to do or diminishes the enjoyment or profit which he would otherwise derive from his property. (Cf. cases collated in the separate opinion of Mr. Justice Brandeis in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, at pp. 345-349, 56 S.Ct. 466.) There are approximately nineteen thousand feet in the plot owned by the plaintiff. The single dwelling house upon it is ninety-five years old and is now in course of demolition. By its adoption of the general map or plan, the city has given notice that at some future time, if present anticipations are realized, it intends to widen the two streets upon which the plaintiff's property abuts. If without building upon the strips of his land which may in the future be included in the widened streets, the plaintiff's property cannot be developed in manner which the plaintiff desires or which would best conduce to the enjoyment or profit which an owner might derive from his land, and if it were shown that the statutes, if valid, would require or even justify a denial of a permit for such development, the adoption of the map might constitute a grievance. In the absence of proof of such facts, it is difficult to see how the plaintiff has been deprived in any manner of the use of his property. Before the court should even consider the question of whether the Legislature could under the police power restrict, without compensation, the use of land in private ownership, there should be proof at least that the statute is in some manner interfering with or diminishing the value of the present property rights of the person complaining. (Compare in this respect the allegations contained in the complaint upon which the Supreme Court of the United States based its jurisdiction to consider such question in Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 368, 374, 47 S.Ct. 114.)

No inference of law, indeed no inference of fact, that the attempted condition has affected or will affect the use to which the

plaintiff's land will be put or has diminished the value of the land, may be drawn from the stipulated facts. There is no suggestion that a plot of nineteen thousand square feet cannot be suitably improved and put to the most profitable use by the erection of a building which does not encroach upon the small portions which may be used hereafter to widen the street. Sometimes land owners in a particular district assume mutual obligations to set back buildings some distance from the streets. Sometimes such obligations are imposed by zoning ordinance. Sometimes an owner does so voluntarily because he believes that such a setback is the best use for the land immediately abutting on the street. The plaintiff or any successor in title to the property could use the land immediately abutting on the street. The plaintiff or any successor in title to the property could use the land within the bed of the widened street for such purpose even without a permit. It may be the best use to which that land could be put, even if no map had been adopted, and there were no probability that the city would in time widen the street. Certainly it cannot be said that owners of property do not receive any benefit from the adoption of general maps or plans for the development of city streets, if they can develop their land with some assurance that other owners will not be permitted to frustrate the plan, maliciously or unreasonably. Whether the State may impose conditions for the issuance of permits in order to protect the integrity of the plan of a city where it appears that such conditions interfere with a reasonable use to which the land would otherwise be put or diminishes the value of the land, should not now be decided. Without proof that the imposition of such conditions has deprived an owner of land of some benefit he would otherwise derive from the land, there can be no deprivation of property for which compensation should be made.

Solicitude for the protection of the rights of private property against encroachment by government for a supposed public benefit does not justify the courts in declaring invalid a public law which serves a public purpose, because ten years after it has been on the statute books a single owner, without proof, or even claim, of actual injury, asserts that he has been deprived of his property.

The judgment of the Appellate Division should be reversed and that of the Special Term affirmed, with costs in this court and in the Appellate Division. . . .

Judgment accordingly.

SECTION 2. PUBLIC AND PUBLIC UTILITY FACILITIES

A. PUBLIC WAYS

A well-conceived configuration of public ways lies at the very core of sound community planning. The basic street plan serves as a sort of framework for community development. This is quite incompatible with the old haphazard location, laying out and improvement of streets, which too often was inspired by speculative interest in long profits. The broad community interest could not be effectually served, for that matter, by the most altruistic private efforts of the real estate "developer." Contemporary planning employs a community-wide projection and is strongly implemented by the exertion of sufficient governmental control of land subdividing by private hands to effect coordination with the master community plan in keeping with the standards upon which it rests.

It is the primary function of major or arterial streets to serve through traffic. Secondarily, they provide light, air, access and view for abutting property. This second function is the primary task of minor streets, which, in addition commonly serve as a channel for utility lines.

(1) Establishment

Legal methods of establishing public ways include common law and statutory dedication, statutory proceedings for purchase or condemnation and dedication by public authority of public lands to street or highway uses.

Common law dedication is an intentional appropriation of land by the owner to the public at large for public use and acceptance of it for the purpose by or on behalf of the public. Dedication was originally employed merely as to highways but it later came to be applied to parks, public squares and landing places and even special uses, such as schools, which were not open to enjoyment by the public in general. The leading American case, City of Cincinnati v. White, 6 Peters 431, 8 L.Ed 427 (1832), involved dedication of land as a common. Dedication is a type of conveyancing which can be effected by parol. In theory it rests upon intention and great freedom is exercised in looking to the conduct of an owner to determine whether he had an animus dedicandi. A commonplace illustration is the case of the owner who lays out a street across his land and opens it to public use.

Ordinarily a common law dedication involves merely an easement but an owner may, of course, convey title in fee, if he so desires.

Often there is no clear manifestation of intention. If there has been long public user as a street or highway it may be said that the necessary intent will be conclusively presumed or implied. More realistically, what takes place in such a case is the legal equivalent of dedication without any actual intent to dedicate having been made out. Where public user has continued for the period of limitations of real actions the public easement is sometimes said to rest upon prescription, which, in turn, is usually grounded upon hostile, adverse user. Thus, we often find prescription set forth as a separate method of establishing a public way. See 3 Tiffany, Real Property § 924 (3rd ed. 1939). The editor suggests that the prescription theory is more confusing than helpful. Is it not better to leave that theory to private easements, which lie in grant, and to adhere consistently to the dedication formulation in treating of public ways?

The type of dedication of greatest practical moment is that effected by platting of land and the sale of lots with reference thereto. It seems safe to say that the bulk of dedication to street and highway uses for many years has been effected by land subdivision and platting. While the mere making and even filing of a plat may not be considered conclusive, it is strong evidence of an intent to dedicate the public ways marked upon it. The problem is one of interpretation in the resolution of which extrinsic evidence of the conduct of the owner may be helpful. After he sells lots by reference to his plat, even though not recorded, the "subdivider" may be estopped, as against the purchasers, to deny that the strips shown on the plat as streets have been dedicated to public use. That is a matter of private relations and does not control the question of dedication to the public. Actual sales with reference to a plat should, however, clinch the matter as to intent to dedicate to public use. Decisions embracing the so-called "unity plan" accord a lot purchaser a private easement as to all streets shown on the plat, but there is authority that the interest extends only to those streets upon which he must depend for access to his lot. State ex rel. Kincaid v. Hamilton, 109 Tenn. 276, 70 S.W. 619 (1902); 4 McQuillin, Mun. Corps. § 1684 (2d ed. rev. vol. 1943). See Huddleston v. Deans, 124 W.Va. 313, 21 S.E.2d 352 (1942), discussed in 49 W.Va.L.Q. 88 (1942).

It is generally conceived that a common law dedication must be perfected by acceptance. Acceptance may be by public user, or by formal or informal act of cognizant public authority. Official repair or improvement of a street by responsible authority is an example of informal acceptance. For a collection of cases see 4 McQuillin, op. cit. supra, § 1704 et seq. There is some authority that acceptance is not necessary where the owner records a plat and sells lots with reference to it. 4 Tiffany, op. cit. supra, § 1106. It obviously may be so provided under a scheme of statutory dedication. In any event, public user or public improvement of some of the streets in a platted subdivision may be deemed acceptance of all streets shown on the plat. Huddleston v. Deans, supra.

Public responsibility for the maintenance of public ways and the regulation of their use has understandably been an important factor in many cases involving the question of acceptance of dedications. The dedication might be considered definitive and final so far as the owner was concerned, quite apart from this question. It has not, moreover, uniformly precluded the fixing of responsibility where acceptance was made out by public user alone. The cases are divided on that question. See 4 Tiffany op. cit. supra, § 1107.

Statutory dedication, that is, dedication in a manner provided by statute, is not ordinarily exclusive. Thus, in a given case, a sufficient common law dedication might be made out although the statute had not been satisfied. III Dillon, Mun.Corps. § 1071 (5th ed. 1911), McQuillin, op. cit. supra, § 1665. Under a scheme of statutory dedication the fee, and not merely an easement, may pass to the public. Strict compliance with statutory requirements is usually exacted by the courts.

Planning laws seize upon recordation as the point of control of land platting. An unapproved plat may not be recorded. The vital sanction here, however, is the police power, not regulation of the filing of documents of public record. It is a crucial control in the preservation and effectuation of a master plan.

A planning act may be so drawn as to obviate questions about dedication of ways shown on plats. The City Planning Law of New York which appears as certain sections of the General City Law, has a pertinent provision, as follows:

"Section 34. Record of plats. No plat of a subdivision of land showing a new street or highway shall be filed or recorded in the office of the county clerk or register until it has been approved by a planning board which has been empowered to approve such plats, and such approval be endorsed in writing on the plat in such manner as the planning board may designate. It shall be the duty of the county clerk or register to notify the planning board in writing within three days of the filing or recording of any plat approved by such planning board, identifying such plat by its title, date of filing or recording, and official file number. After such plat is approved and filed, subject, however, to review by court as hereinafter provided, the streets, highways and parks shown on such plat shall be and become a part of the official map or plan of the city. The owner of the land or his agent

who files the plat may add as part of the plat a notation if he so desires to the effect that no offer of dedication of such streets, highways, or parks, or any of them is made to public.

"Formal offers of cession to the public of all streets, highways or parks not marked with such notation on the plat shall be filed with the planning board prior to the approval of the plat by the planning board. In the event that the owner or his agent shall elect not to file his plat prior to the expiration date of the validity of such approval provided in section thirty-two then formal offers of cession shall be deemed to be invalid, void and of no effect on and after such expiration date.

"Every street shown on a plat that is hereafter filed or recorded in the office of the county clerk or register as provided in this section, shall be deemed to be a private street until such time as it has been formally offered for cession to the public and formally accepted as a public street by ordinance of the local legislative body, or alternatively until it has been condemned by the city for use as a public street. . . "

KUEHN v. VILLAGE OF MAHTOMEDI

Supreme Court of Minnesota, 1940. 207 Minn. 518, 292 N.W. 187.

JULIUS J. OLSON, JUSTICE. Plaintiff, seeking damages from defendant, predicates his right of recovery upon three causes of action. Defendant's general demurrer to each thereof was sustained as to the first and second causes, but overruled as to the third. Plaintiff appeals from the order insofar as the first and second causes are concerned, defendant from that part overruling its demurrer. The appeals have been consolidated and jointly briefed and argued here. We shall dispose of them in the order mentioned.

The facts general to all three causes are these: Plaintiff now is, and over a period extending back prior to 1927 was, the owner of "a water plant comprised of wells, pumps, tanks, mains, and pipes of the character incident and necessary for use in supplying private customers with water" in a described area in Lincoln township, Washington county. In 1931 defendant village was organized as a municipal corporation out of a portion of the mentioned township. At that time plaintiff's system was operating without competition by anyone. In 1933 defendant, with full knowledge of the existence and operation of plaintiff's system, laid out and constructed its own water supply system.

The second cause relates to an area referred to as "subdivision of blocks two (2) and three (3), East Shore Park," as shown by a plat. By this plat there was reserved to the owner and his successors in title and interest "the exclusive right to lay and main-

tain water pipes and erect tanks in any and all of" the streets, avenues and alleys so dedicated. The village constructed water system also invaded this supposed exclusive area of plaintiff, and as a consequence his business was much hurt because former customers thereafter refused to purchase water from him but became customers and users of defendant's water supply system. For this he wants \$10,000 as damages. . . .

In respect to the second cause of action, plaintiff claims that the reservation in the original dedication reserved the right now asserted by him. We think the rule is well settled that the right to use public streets and highways for such or similar purposes as those placed there by plaintiff is a privilege that may be exercised only by sovereign grant. True, the sovereign may clothe its subdivisions and municipalities with such power. But, as we have seen, no such power has been granted here. So the question arises, may an individual by reservation withhold from the municipality the sovereign power incident to the public use of streets and highways? We think the rule applicable in the instant case is accurately stated in 18 C.J. p. 71 [§ 64]: "There are certain limitations of the general rule permitting the dedicator to impose conditions and limitations. Thus he cannot attach to the dedication any conditions or limitations inconsistent with the legal character of the dedication, or which take the property dedicated from the control of the public authorities, or which are against public policy; and the dedication will take effect regardless of such condition which will be construed as void." Many authorities are there cited sustaining the quoted text. Helpful also are 4 McQuillin, Municipal Corporations, 2d Ed., § 1670, at page 496; 2 Pond, Public Utilities, 4th Ed., §§ 494, 495. In § 496, at page 865, that author says: "The power to grant franchises is a high legislative trust." In Village of Grosse Pointe Shores v. Ayres, 254 Mich. 58, 64, 65, 235 N.W. 829, 831, the court said:

"The dedication of property for the purpose of a highway carries the right to public travel and also the use for all present and future agencies commonly adopted by public authority for the benefit of the people, such as sewer, water, gas, lighting, and telephone systems. . . .

"A condition in a deed of dedication prohibiting the uses above stated or circumscribing the future freedom of action of the authorities to devote the street to the wants and convenience of the public is void, as against public policy or as inconsistent with the grant."

We conclude that the order insofar as it sustains defendant's demurrers to the first and second causes should be affirmed; that as to the third cause the order should be reversed.

So ordered.1

Contemporary planning can obviate at the outset the type of reservation attempted in the foregoing case. A planning board may, in adopting rules and regulations governing platting, spell out a ban upon any reservation out of harmony with full public control for street purposes, whether primary or incidental. It may go further and require, where streets and alleys are not considered the best location for utility lines, pipes, and the like, other provision for the purpose. Thus the regulations adopted by the City of Warwick, Rhode Island, on August 24, 1945, contain the following paragraph:

"If in the opinion of the Board the most suitable and reasonable locations for sewers, storm drains, water and gas pipes, electric pole lines and conduits, or other utilities likely to be required do not lie wholly within the streets or alleys shown upon the plat, the Board may require, insofar as reasonable, provision to be made for the location of such utilities on other routes. Such requirements must be effectuated by the dedication of public easements as a part of the plat or by the filing of supplementary instruments which will adequately protect the public interest in the proper location of said utilities."

STATE ROAD COMMISSION OF WEST VIRGINIA v. CHESA-PEAKE & OHIO RY. CO.

Supreme Court of Appeals of West Virginia, 1934. 115 W.Va. 647, 177 S.E. 530.

HATCHER, JUDGE. The major portion of East avenue in the city of South Charleston is occupied jointly by the public highway and an industrial track of the Chesapeake & Ohio Railway Company. The State Road Commission brought this proceeding in mandamus to require the railway company to remove its track from a portion of the avenue which the commission deems necessary for use in improving the highway.

The chronological facts relating to this controversy are as follows: In 1908, the Kanawha Land Company, then the owner of that part of South Charleston embracing the parcel in litigation, platted its land into lots and streets, sold property with reference to the plat, and had a copy of the plat recorded. One

¹ The principal case is discussed in 25 Minn.L.Rev. 240 (1941).

of the streets of this division is East avenue. In 1910, the Land Company constructed a railroad on and near the north side of the avenue. There is some question as to the exact location of the original construction; but that question is not important herein, as there has been no change in the location since 1914. In 1915, the public authorities paved a section of the avenue south of and adjacent to the railroad, thereby for the first time recognizing the avenue as a public thoroughfare. And in 1917, the Land Company quitclaimed to the respondent a strip eighteen feet wide along the northern side of the avenue, which included the railroad.

The commission takes the position that the acts of the Land Company in 1908 constituted an irrevocable dedication of the avenue to public use. The respondent replies that such acts constituted a mere offer of dedication to public use which the Land Company could withdraw or modify at any time before acceptance by the public authorities; that the construction of the railroad prior to 1915 constituted a modification of the offer; and that, as so modified, the offer was accepted.

The law is settled in this jurisdiction that no acts of a private owner can make a strip of land a public highway. Acts such as those of the Land Company herein constitute merely an offer of dedication to public use which must be accepted by the public authorities to make the dedication complete. Before acceptance the dedicator may withdraw the offer, or he may impose any reasonable condition on the offer which does not defeat the purpose of the dedication. A condition which is inconsistent with the legal character of the dedication or would take it from public control is void as against public policy, and upon public acceptance the dedication is not affected by the condition. 9 A. & E. Ency. Law, subject Dedication, p. 75; 18 C.J., subject Dedication, §§ 62 and 64; Elliott, Roads and Streets (4th Ed.) § 163; Dillon, Municipal Corporations (5th Ed.) § 1075; McQuillin, Id. (2d Ed.) § 1670; Riddle v. Charlestown, 43 W.Va. 796, 28 S.E. 831; City of Point Pleasant v. Caldwell, 87 W.Va. 277, 104 S.E. 610. The construction of a railroad by the dedicator in a proposed public street prior to public acceptance has been held to qualify the dedication. Cohoes v. Delaware Co., 54 Hun. (N.Y.) 558, 7 N.Y.S. 885. That case was reversed in 134 N.Y. 397, 31 N.E. 887, but on other grounds. The right to operate a railroad in a public street has been held to be a reasonable condition of dedication. Brunswick R. Co. v. Mayor, etc., of City of Waycross, 91 Ga. 573, 575, 17 S.E. 674; City of Noblesville v. R. Co., 130 Ind. 1, 4, 5, 29 N.E. 484. In each case, however, it was stated, in effect, that the railroad did not unduly restrict the public use of the highway; and that the railroad was subject to any reasonable

regulation by the public authorities which tended to reduce the danger and inconvenience to the public. Consequently, while the construction of the railroad on the avenue prior to its public acceptance constituted a dedicatory condition, yet that condition can be upheld only on the theory that it is completely subject to reasonable public regulation.

Counsel would treat the quitclaim of the eighteen-foot strip in 1917 as validly defining the width of the railroad right of way. That quitclaim could not confer on the grantee any higher rights than the Land Company had in 1915 (when the avenue was accepted by the public authorities), because the right of further dedicatory qualifications ceased at that time. Elliott, supra, § 186. Prior thereto the Land Company had not even attempted to define the boundaries of the railroad right of way by certain arbitrary lines. Therefore, the quitclaim can be taken merely as a conveyance of the bare easement, which is bounded, not by the trapezoidal lines selected by the Land Company in 1917, but "by the lines of reasonable enjoyment." 19 C.J., subject Easements, § 223.

The present location of the railroad prevents the necessary expansion of the paved portion of the highway to meet modern requirements. It appears from the evidence that there is a longunused space between the land now used by the railroad and the northern line of the avenue. That space varies from a few to a number of feet in width. It is unavailable for highway purposes. yet it would serve pro tanto as a roadbed for the track equally as well as its present location. If the track be moved northward but a few feet and the unused space utilized as part of its roadbed. then the part vacated by the move could be used by the commission to expand the public roadway. The move would not seriously inconvenience the respondent. We are cognizant of the rule forbidding the alteration of a definitely established easement except by mutual consent of the owners of the dominant and the But that rule applies to private parties, and servient estates. must bow to the paramount interest of the public where the latter is concerned. Moreover, we presume that the location of the track so as to leave a space of no use to the Land Company and not available to the public was inadvertent and unintentional We are accordingly of opinion that reasonable public regulation requires the move.

The writ, molded in conformity to this opinion, will issue. Writ awarded.²

² The principal case is discussed in 41 W.Va.L.Q. 293 (1935).

(2) Improvement

"The power to open and improve streets is legislative in its origin and must be conferred upon the municipality by a statutory enactment." III Dillon, Mun.Corps. § 1144 (5th ed. 1911). There will, however, seldom be any question about the power of a local unit to undertake the improvement of public ways within its general governmental jurisdiction. The legislature would hardly impose responsibility without granting authority needed to effect its discharge.

With respect to the legal methods of bringing about such improvements, in a given state, control of subdivisional platting will be found to serve as a significant method of placing the burden on the subdivider as to new sidewalks and streets in the area platted. Thus, the City Planning Law of New York (in Section 33 of the General City Law) provides that "In approving such plats the planning board shall require . . . that all streets or other public places shown on such plats shall be suitably graded and paved and that sidewalks, street lighting standards, curbs, gutters, street trees, water mains, sanitary sewers and storm drains or combined sewers shall be installed all in accordance with standards, specifications, and procedure acceptable to the appropriate city departments, or alternately that a performance bond sufficient to cover the full cost of the same . . . be furnished. . . ."

The entire burden of building and paving sidewalks along old or new streets may, under legislative authority, be imposed by a local unit upon the owner of abutting property. III Dillon, op.cit. supra, § 1147.

There still exist on the statute books in some states vestiges of the ancient English practice, which formed a part of our local governmental heritage, of requiring the able-bodied citizenry to work a certain number of days each year on the job of maintaining and improving highways. It came about, of course, that one would be permitted to commute the duty by a money payment. Note the Florida statute upheld in Butler v. Perry, 240 U.S. 328, 36 S.Ct. 258 (1916). The compulsory service required by the Florida statute was attacked, in the Perry case, as violative of the Thirteenth Amendment. The Supreme Court had no trouble in rejecting the contention; the case was one of an exceptional duty of service owed to one's government which was deeply rooted in history and beyond the purpose of the Amend-An interesting variation is the requirement that rural residents provide two-horse wagons and teams for limited road service. See Galoway v. State, 139 Tenn. 484, 202 S.W. 76

(1917). Today's needs render citizen-service methods anachronistic. Upkeep and maintenance are current responsibilities normally performed by a local unit's own force and financed from current funds. Road and street construction and improvement, on the other hand, are capital projects in the financing of which resort to capital budgeting or the borrowing power of government is appropriate. Possible types of financing for which there may be authority in a given situation include use of available funds on hand, issuance of general obligation bonds and special assessment financing, which may or may not involve issuance of bonds on other evidence of indebtedness. Revenue bonds may be an authorized method where road or bridge tolls are contemplated.

Authority to construct or improve public ways includes, as a reasonable incident to that primary authority, the power to establish or change a street grade. The law, as developed by the judges, does not, in most states, impose upon a local unit liability for consequential damages resulting from a change of grade made in the exercise of reasonable care and skill. Jenkins v. City of Henderson, 214 N.C. 244, 199 S.E. 37 (1938). If the effect of a change of grade is to deny all access to abutting property it may be determined that there has been a "taking" of his property for which he is entitled to compensation. Sanderson v. City of Baltimore, 135 Md. 509, 109 A. 425 (1920). In some states a right to compensation has been conferred by statute. State constitutional provisions requiring the making of compensation not only where property is taken for public purposes but also where there is damage to private property are generally construed to grant a right to compensation in the change of grade cases. IV Dillon, op. cit. supra, § 1677.

Elevated viaducts and bridge approaches erected over streets have, in New York, been dealt with as on a parity with changes in grade. If the viaduct or bridge is a public way the use is considered a proper street use and such rights as the owner of abutting property may have to light, air and access, are subject to the authority of the municipality to erect the structure as a street improvement. Sauer v. City of New York, 180 N.Y. 27, 72 N.E. 579 (1904). Upon review of the Sauer case in the Supreme Court of the United States, which resulted in an affirmance, it was determined that the property owner had not been denied due process of law. Sauer v. City of New York, 206 U.S. 536, 27 S.Ct. 686 (1907). The Elevated Railroad Cases, which had recognized a right to compensation, were distinguished on the ground that an elevated structure for railroad use, to the exclusion of normal street traffic, was a non-street use amounting to an additional servitude.

An interesting situation is presented by the removal of a structure, such as an elevated railroad, for damages consequent upon the construction of which owners of abutting property had been compensated. An award of damages to the receiver of the railroad company, to be paid by the lot owners, which was in the amount the company paid to the then lot owners as compensation at the time of construction, was upheld by the Supreme Court in Roberts, Receiver, v. New York City, 295 U.S. 264, 55 S.Ct. 689 (1935).

BACICH V. BOARD OF CONTROL OF CALIFORNIA

Supreme Court of California, 1944. 23 Cal.2d 343, 144 P.2d 818.

CARTER, JUSTICE. The demurrers of defendants Board of Control, California Toll-Bridge Authority and State Department of Public Works to plaintiff's complaint for damages in this action in inverse condemnation were sustained without leave to amend.

Plaintiff alleges that he is the owner of an improved lot situated on the west side of Sterling Street between the intersection of that street with Bryant Street and Harrison Street in the City and County of San Francisco, the two latter streets being parallel: that before the construction of the improvement hereinafter mentioned Harrison Street was level with Sterling Street and he had access from his lot to Harrison Street by footpaths and street railway: that a street railway extending along Sterling Street served his property; that the area around his property was formerly used for residential purposes; that the construction of the approaches to the San Francisco Bay Bridge by defendants resulted in the lowering of Harrison Street fifty feet, leaving as the only access thereto an almost perpendicular flight of steps. the destruction of the residence property in the area, the removal of the street railway, and the erection of an elevated highway between his lot and Bryant Street which he must pass under to reach the latter street; that by reason of the foregoing his property has been damaged in the sum of \$14,000; and that he filed a claim for those damages with defendant Board of Control which was rejected.

The major issue presented in this case is whether or not plaintiff may recover compensation under the constitutional provision (Cal.Const. art. I, sec. 14) in the light of the facts stated by him. He is entitled thereto under the wording of that provision if his property has been taken or damaged for a public use. The solution of that question depends largely upon the character and extent of his property right. If he has a property right and it has been impaired or damaged, he may recover. The test fre-

quently mentioned by the authorities, that he may recover if he has suffered a damage peculiar to himself and different in kind, as differentiated from degree, from that suffered by the public generally, is of no assistance in the solution of the problem. If he has a property right and it has been impaired, the damage is necessarily peculiar to himself and is different in kind from that suffered by him as a member of the public or by the public generally, for his particular property right as a property owner and not as a member of the public has been damaged. See Rose v. State of California, supra. . . .

It has long been recognized in this state and elsewhere that an owner of property abutting upon a public street has a property right in the nature of an easement in the street which is appurtenant to his abutting property and which is his private right, as distinguished from his right as a member of the public. That right has been described as an easement of ingress and egress to and from his property or, generally, the right of access over the street to and from his property, and compensation must be given for an impairment thereof. We are not now inclined to question or disturb that rule. See Rose v. State of California, supra: Eachus v. Los Angeles, etc., Ry. Co., 103 Cal. 614, 37 P. 750, 42 Am.St.Rep. 149; McCandless v. City of Los Angeles. 214 Cal. 67, 4 P.2d 139; Lane v. San Diego Elec. R. Co., 208 Cal. 29, 280 P. 109; Wilcox v. Engebretsen, 160 Cal. 288, 116 P. 750; Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P. 330; Brown v. Board of Sup'rs, 124 Cal. 274, 57 P. 82; Geurkink v. City of Petaluma, 112 Cal. 306, 44 P. 570; Bigelow v. Ballerino, 111 Cal. 559, 44 P. 307; 10 Cal.Jur. 333-335; 18 Am.Jur., Eminent Domain, secs. 181-185; In re Hull, 163 Minn. 439, 204 N.W. 534, 205 N.W. 613, 49 A.L.R. 330; New York, C. & St. L. R. Co. v. Bucsi, 128 Ohio St. 134, 190 N.E. 562, 93 A.L.R. 639. The precise origin of that property right is somewhat obscure but it may be said generally to have arisen by court decisions declaring that such right existed and recognizing it. See 18 Am.Jur., Eminent Domain, sec. 181; 41 Yale Law Journal 221. For that reason, in the determination of the extent and character of that right most of the cases rely, without discussion, upon precedents which fit or are analogous to the circumstances present in the case before the court. If the question is one of first impression its answer depends chiefly upon matters of policy, a factor the nature of which, although at times discussed by the courts, is usually left undisclosed. It may be suggested that on the one hand the policy underlying the eminent domain provision in the Constitution is to distribute throughout the community the loss inflicted upon the individual by the making of public improvements. See 41 Yale Law Journal, 221-224; 52 Harv.L.Rev. 1176, 1177; 3 Harv.

L.Rev. 189-205. Manifestly, the addition to the eminent domain clause in constitutions in most states, including California, of "or damaged" to the word "taken" indicates an intent to extend that policy to embrace additional situations. On the other hand, fears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost. See Davis v. County Com'rs, 153 Mass. 218, 26 N.E. 848, 850, 11 L.R.A. 750; 13 Va.L.Rev. 334–337. However, it is said that in spite of that so-called policy "the courts cannot ignore sound and settled principles of law safe-guarding the rights and property of individuals. This [improvement | may be of great convenience to the public generally, but the properties of abutting owners ought not be sacrificed in order to secure it"; and, quoting from Sedgwick on Constitutional Law: "The tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the State should not pay for property which it destroys or impairs the value, as well as for what it physically . ." Liddick v. City of Council Bluffs, Iowa, 5 N.W. 2d 361, 372, 382.

In some degree those opposed policies are manifested in the conflict between the constitutional mandate that compensation be paid when private property is taken or damaged for a public purpose and the exercise of police power where compensation need not be paid. The line between those two concepts is far from clearly marked. It will be recalled that in the instant case it is alleged that by reason of the lowering of Harrison Street fifty feet below the level of Sterling Street the access that plaintiff formerly had to Harrison Street from Sterling Street has now been lost except for an almost perpendicular flight of stairs. The condition resulted from the construction of a public improvement, namely, approaches to a bridge spanning San Francisco Bay. It does not appear that any compelling emergency or public necessity required its construction without the payment of compensation for property damaged. Therefore, the State may not escape the payment of compensation under the police power.

The ultimate effect of lowering Harrison Street was to place plaintiff's property in a cul-de-sac. Whereas, before he had access to Harrison Street, the next intersecting street from his property on Sterling Street, he now has access in one direction only, that is, to Bryant Street, the next intersecting street in the opposite direction. The existence of access in one direction to the general system of streets has been impaired to the extent that there is now left only the stairway. Plaintiff alleged that formerly Sterling Street was level with Harrison Street, which may be interpreted to mean that general access was available.

He does state that formerly he had access by a streetcar line and footpaths. That being true his access by those modes has been lost except to the extent that the stairway is a substitute for pedestrian access. In that respect his property has been placed in a cul-de-sac. Moreover, his request for leave to amend may be construed to embrace a showing that formerly there was access to Harrison Street for vehicular traffic, or at least that there was a right of way or public street, improved or unimproved, joining Sterling Street with Harrison Street. Furthermore, it is apparently conceded by defendants that a cul-de-sac has been created. That plaintiff's property has been damaged by the impairment cannot be here questioned. The allegation in his complaint that it has been must be taken as true.

Whether or not such impairment is compensable must depend upon the character and extent of his easement of access. Does it extend to a right to pass to the next intersecting streets? Nothing more need be decided in this case; we are not concerned with the correct rule in a case where the obstruction occurs beyond the next intersecting street nor with what the rule may be for rural property. Practically all authorities hold, and we believe correctly, that no recovery may be had where the obstruction is beyond the next intersecting street. See cases cited: 4 McQuillin, Municipal Corporations, 2d Ed., 279-280, sec. 1527; 1 Lewis on Eminent Domain, 3d Ed., 350, 383, secs. 191, 203; 25 Am.Jur., Highways, sec. 318: In re Hull, 163 Minn, 439, 204 N.W. 534, 205 N.W. 613, 49 A.L.R. 330: New York, C. & St. L. R. Co. v. Bucsi, 128 Ohio St. 134, 190 N.E. 562, 93 A.L.R. 639. The extent of the easement of access may be said to be that which is reasonably required giving consideration to all the purposes to which the property is adapted. It is obvious that in the instant case the damage suffered is greater and different than if the obstruction had been beyond the next intersecting street. Where formerly plaintiff had an outlet from his property at both ends of Sterling Street, he now has access at only one end, which definitely affects ingress to and egress from his property. It would seem clear that the reasonable modes of egress and ingress would embrace access to the next intersecting street in both directions. It should be noted that the right is more extensive than the mere opportunity to go on to the street immediately in front of the property. Rose v. State of California, supra. We are not confronted with the necessity of balancing the conflicting policies heretofore referred to without the aid of persuasive precedent. Many authorities and writers have either declared or intimated that the creation of a cul-de-sac, that is, the blocking of access to the next intersecting street in one direction is compensable, although the access still exists in

the opposite direction to an intersecting street. In other words. the easement is of that extent. See Felton v. State Highway Board, 47 Ga.App. 615, 171 S.E. 198; City of Chicago v. Baker. 7 Cir., 98 F. 830, 39 C.C.A. 318; City of Chicago v. Burcky, 158 Ill. 103, 42 N.E. 178, 29 L.R.A. 568, 49 Am.St.Rep. 142; Davis v. City of Chicago, 290 Ill.App. 244, 8 N.E.2d 378; Falender v. Atkins, 186 Ind. 455, 114 N.E. 965; O'Brien v. Central Iron & Steel Co., 158 Ind. 218, 63 N.E. 302, 57 L.R.A. 508, 92 Am.St.Rep. 305: Magdefrau v. Washington County, 228 Iowa 853, 293 N.W. 574: Liddick v. City of Council Bluffs, supra; Highbarger v. Milford, 71 Kan. 331, 80 P. 633; Burton v. Freund, 243 Mich. 679, 220 N.W. 672: Dean v. Ann Arbor R. Co., 137 Mich. 459, 100 N.W. 773: Vanderburgh v. City of Minneapolis, 98 Minn. 329, 108 N.W. 480, 6 L.R.A., N.S., 741; Locascio v. Northern Pac. R. Co., 185 Minn. 281, 240 N.W. 661; In re Hull, 163 Minn. 439, 204 N.W. 534, 205 N.W. 613, 49 A.L.R. 320; Lowell v. Buffalo County, 123 Neb. 194, 242 N.W. 452; Id., 119 Neb. 776, 230 N.W. 842; Mandell v. Board of Com'rs of Bernalillo County, 44 N.M. 109, 99 P.2d 108: In re City of Buffalo, Grade Crossing Com'rs, 210 App.Div. 328, 206 N.Y.S. 103, affirmed 240 N.Y. 612, 148 N.E. 727: In re William and North William Streets, 103 Misc. 313, 171 N.Y.S. 116, affirmed 188 App.Div. 668, 177 N.Y.S. 318; Hiatt v. City of Greensboro, 201 N.C. 515, 160 S.E. 748; Cov v. City of Tulsa, D.C., 2 F.Supp. 411; Atchison, T. & S. F. R. Co. v. Terminal Oil Mill Co., 180 Okl. 496, 71 P.2d 617; Sandstrom v. Oregon-Washington R. & Nav. Co., 69 Or. 194, 136 P. 878, 49 L.R.A., N.S., 889; Cooke v. City of Portland, 136 Or. 233, 298 P. 900; In re Vacation of Part of Melon Street, 182 Pa. 397, 38 A. 482, 38 L.R.A. 275; Spang & Co. v. Commonwealth, 281 Pa. 414, 126 A. 781; Hindes v. Allegheny County, 123 Pa. Super. 469. 187 A. 219; Johnsen v. Old Colony R. Co., 18 R.I. 642, 29 A. 594. 49 Am.St.Rep. 800; Illinois Cent. R. Co. v. Moriarity, 135 Tenn. 446. 186 S.W. 1053; City of Texarkana v. Lawson, Tex.Civ.App., 168 S.W. 867; McQuillin, Municipal Corporations, 2d Ed., vol. 4. 276-278; secs. 1526-1527; Lewis on Eminent Domain, 3d Ed., vol. 1, 350-351, sec. 191; 16 Harv.L.Rev. 372; 39 Yale L. Journal 128. There are cases to the contrary (see In re Hull, 163 Minn. 439, 204 N.W. 534, 205 N.W. 613, 49 A.L.R. 330, New York, C. & St. L. R. Co. v. Bucsi, 128 Ohio St. 134, 190 N.E. 562, 93 A.L.R. 639), but some of them are based upon a constitutional provision which allows compensation for taking alone, no mention being made of a damaging. Many of them advance no sound reason for not permitting recovery, and arrive at the result with unenlightening phrases which furnish no real test. We do not fear that permitting recovery in cases of cul-de-sacs created in a municipality will seriously impede the construction of improvements, assuming the fear of such an event is real rather than fancied. The damage to the property owner is immediate and direct. The value of the use of the property is directly affected. To be able to get onto the street immediately in front of the property is of little value if that is as far as he can go. If he has access to the next intersecting street in both directions and one way is cut off, his easement, if it has any value to him at all, has certainly been impaired. We conclude, therefore, that the right of access extends in both directions to the next intersecting street.

There is more than merely a diversion of traffic when a culde-sac is created. The ability to travel to and from the property to the general system of streets in one direction is lost. One might imagine many circumstances, as has been shown by defendants, in which recovery should not be permitted or where the reasons for recovery in the cul-de-sac cases might not be logically applied, but we are here concerned with the particular facts of this case and do not purport to declare the law for all cases under all circumstances.

The other items of damages claimed by plaintiff are not compensable. He asserts that all the residences, except his own, in a described area in which his property is situated were eliminated by defendants, and that a street railway formerly operating on Sterling Street has been removed. There is no property right appurtenant to plaintiff's property on Sterling Street which entitles him to the maintenance of the residences or the continuous operation of the existing street railway. The removal of the residences and leaving the property vacant did not constitute a nuisance. It does not appear that the elevated road between plaintiff's property and Bryant Street in any way interferes with his access to the latter street or impairs any easement, if one exists, to light, air or view.

The judgment is reversed, and the court below is directed to permit the plaintiff to amend his complaint if he be so advised in conformity with the views herein expressed.

TRAYNOR, JUSTICE (dissenting). I dissent. . . .

The basic question in this appeal is whether the property that plaintiff alleged was taken or damaged existed at all. If the abutting owner has an easement in the street longitudinally to the next intersection in each direction, compensation must be paid for the impairment of that easement. See United States v. Welch, 217 U.S. 333, 339, 30 S.Ct. 527, 54 L.Ed. 787, 28 L.R.A., N.S., 385, 19 Ann.Cas. 680. If he does not have such an easement he can have no recovery even though the value of the abutting property may be diminished as a result of the improvement. Reichelderfer v. Quinn, 287 U.S. 315, 319, 53 S.Ct. 177, 77 L.Ed. 331, 83 A.L.R.

1429; Eachus v. Los Angeles, etc., Ry. Co., 103 Cal. 614, 617, 37 P. 750, 42 Am.St.Rep. 149; Rose v. State of California, 19 Cal.2d 713, 737, 744, 123 P.2d 505; Rigney v. City of Chicago, 102 Ill. 64, 80; City of Winchester v. Ring, 312 Ill. 544, 550, 552, 144 N.E. 333, 36 A.L.R. 520; Nelson v. State Highway Bd., 110 Vt. 44, 1 A.2d 689, 118 A.L.R. 921.

There is nothing in the history of the right of ingress and egress to indicate that it embraces any such easement. right of ingress and egress is a creation of judicial decision.3 See Crane v. Hahlo, 258 U.S. 142, 42 S.Ct. 214, 66 L.Ed. 514. Its operation as a limitation on street improvements by municipalities and public utilities originated in the New York elevated railway cases. In the leading case of Story v. New York El. R. Co., 90 N.Y. 122, 43 Am.Rep. 146, an injunction was sought to restrain the erection of an elevated railway in the street on which plaintiff's property abutted. The court held that the use of the street for elevated railway purposes was inconsistent with the use of the right of way for street purposes. The city had subdivided the land originally, laid out the streets and lots, and conveyed the land by deeds containing a covenant that the streets shown on the maps should forever remain open as public streets and ways. The court cited the ordinary rule that a grantor making a conveyance that refers to a map showing streets cannot divert the lands to any use inconsistent with the normal uses of the street. The court held that this rule applied to the city in its role as subdivider. In Lahr v. Metropolitan E. Ry. Co., 104 N.Y. 268, 10 N.E. 528, however, the court held that even where the abutters did not derive their title from the city and had no express cove-

^{3 [}Footnotes renumbered.] The origin of the whole doctrine of abutters' rights is graphically described in the dissenting opinion of Mr. Justice Holmes in Muhlker v. New York & H. R. Co., 197 U.S. 544, 572, 25 S.Ct. 522, 528, 49 L.Ed. 872: "The plaintiff's rights, whether expressed in terms of property or of contract, are all a construction of the courts, deduced by way of consequence from dedication to and trusts for the purposes of a public street. They never were granted to him or his predecessors in express words, or, probably, by any conscious implication. If at the outset the New York courts had decided that, apart from statute or express grant, the abutters on a street had only the rights of the public and no private easement of any kind, it would have been in no way amazing. It would have been very possible to distinguish between the practical commercial advantages of the expectation that a street would remain open and a right in rem that it would remain so. . . . But again, if the plaintiff had an easement over the whole street he got it as a tacit incident of an appropriation of the street to the uses of the public. . . . it was possible for the New York courts to hold, as they seem to have held, that the easement which they had declared to exist is subject to the fullest exercise of the primary right out of which it sprang, and that any change in the street for the benefit of public travel is a matter of public right. as against what I have called the parasitic right which the plaintiff claims."

nant, such as existed in the Story case, they nevertheless had an easement of access to the street. The basis of the decision was that under the New York statutes whereby streets were opened a trust was created for the benefit of the public at large and also for the benefit of abutting owners. The court held that an easement of access was implicit in the trust. Later, however, it took care to hold that the abutting owner's rights are subordinate to any reasonable use of the street made by public authorities to facilitate general travel. Reining v. New York, L. & W. R. Co., 128 N.Y. 157, 28 N.E. 640, 14 L.R.A. 133; Rigney v. New York C. & H. R. Co., 217 N.Y. 31, 111 N.E. 226. Presumably the public right to use the street was reserved if the city subdivided and sold the lots in the street: conversely compensation for the normal uses of the street was paid if the street or highway was condemned or conveyed. See Davis v. County Com'rs, 153 Mass. 218, 26 N.E. 848, 850, 11 L.R.A. 750; 13 Va.L.Rev. 334. While the normal uses of the street are bound to change with the times, the streets are invariably characterized as public rights of way.

The trust that arises from the appropriation of land for public thoroughfares is for the benefit of the public at large and only incidentally for the benefit of abutting owners. The extension of the abutting owner's rights in the present case makes the primary consideration the benefit of abutting owners rather than the benefit of the public. Hitherto no California case has ever defined the right of ingress or egress as inclusive of an easement to the next intersecting street. The rule has been that the right of ingress and egress is limited to adequate and reasonable access to the property from the street, that it does not extend to the full width of the street, or to the full length thereof, or even to all points upon the street in front of the abutting property. It is sufficient if there is access to a street that in turn connects with the general street system. Any improvement that does not materially interfere with such access does no compensable damage. The California Vehicle Code, St.1935, p. 93, and city traffic ordinances abound with regulations that limit a property owner's freedom of movement upon the street on which his property abuts. Thus "U" turns or the making of left turns upon emerging from a building or private driveway are frequently prohibited. and the diversion of traffic into one-way streets is common. Frequently traffic moving in opposite directions is separated by some physical barrier such as a raised curbing. These restrictions have the same effect whether they ensue from traffic regulations or physical obstructions and there is no more reason to allow compensation because of the resulting diminution in property

values or the inconvenience of circuity of travel in the one case than in the other.

The newly created property right in this case is inconsistent not only with the trust from which the right of ingress and egress is derived, but with the established rule in this state and others that street improvements give rise to no compensable damage if there is no injury to the abutting owner different in kind from that suffered by other property owners and the general public. This rule is repudiated in the majority opinion: "If he has a property right and it has been impaired, the damage is necessarily peculiar to himself and is different in kind than that suffered by him as a member of the public generally for his particular right as a property owner and not as a member of the public has been damaged." This statement draws its conclusion from an assumption of the very thing to be proved. The question is whether or not the owner has a property right that has been impaired, and it cannot be assumed that he has without drawing a line between his property and all the other property in the community. When the majority opinion draws the line at the next intersection it arbitrarily attaches a right to abutting property in one block on the street, but not to abutting property on the same street in the next block or to property abutting on neighboring streets, even though they may likewise be diminished in value as a result of the improvement and the owners may be similarly inconvenienced by circuity of travel. Recovery therefore depends upon the accident of location.4

Under the majority opinion new private property rights representing millions of dollars have been carved out of public streets and highways, at the expense not alone of the public treasury but of the public safety. Of recent years the growth of traffic has necessitated the construction of highways with fewer intersecting streets to expedite the flow of traffic and reduce the rate of motor vehicle accidents. Such highways have been constructed through

⁴ The concurring opinion attempts to draw a distinction between abutting owners in the block on which the obstruction exists and other owners, on the ground that "All vehicles entering the block must either turn around or back out in order to leave it." This inconvenience is not essentially different from the inconvenience of circuity of travel, and it is not compensable for the very reasons advanced in the concurring opinion with regard to circuity of travel. See also Jones Beach Boulevard Estates v. Moses, 268 N.Y. 362, 197 N.E. 313, 100 A.L.R. 487; Ralph v. Hazen, 68 App.D.C. 55, 93 F.2d 68, 71; City of Fort Smith v. Van Zandt, 197 Ark. 91, 122 S.W.2d 187. It is commonplace in the operation of motor vehicles to turn around on streets or back out therefrom just as it is to back out from property where there is no space for turning the vehicles. The right of ingress and egress is no more impaired in such situations than on a one-way street or divided highway there where one cannot turn around or back out.

the City of San Rafael, and the Arroyo Seco Parkway from Los Angeles to Pasadena, and the construction of many more is contemplated. In such cases it will be necessary either to close the cross streets or to carry them under or over the freeway, both costly projects. The plans contemplate overhead or subway crossings every few blocks over the freeway, necessarily creating cul-de-sacs of the remaining streets. Similar improvements are involved in the separation of grades of railroads and highways, for it is usually necessary to make a dead end of one or more streets as a highway is raised or lowered to cross the railroad tracks. In the present case the cul-de-sac on Sterling Street was an integral part of the rearrangement of the streets of the City of San Francisco made necessary by the construction of the San Francisco-Oakland Bay Bridge.

The cost of making such improvements may be prohibitive now that new rights are created for owners of property abutting on streets that would be at right angles to the improvements, for these rights must be condemned or ways constructed over or under the improvements. The construction of improvements is bound to be discouraged by the multitude of claims that would arise, the cost of negotiation with claimants or of litigation, and the amounts that claimants might recover. Such claims could only be met by public revenues that would otherwise be expended on the further development and improvement of streets and highways.

It must be remembered that the question is not whether existing easements should be taken without compensation, but whether private rights should be created for an arbitrarily chosen group of private persons, necessitating tribute from the public if it exercises public rights of long standing in the interest of safe and expeditious travel on public thoroughfares.

Rehearing denied; EDMONDS and TRAYNOR, JJ., dissenting.5

 $^{^5\,\}mathrm{The}$ concurring opinion of Edmonds, J., which was joined in by Curtis, J., is omitted.

In Beals v. City of Los Angeles, 23 Cal.2d 381, 144 P.2d 839 (1944), decided at the same time as the principal case, a property owner sought to enjoin vacation of a part of an alley which ran along the rear of her property. Hers was a corner lot and the closing of the alley would deny her access through the alley from the next cross street on one side but not that on the other. In holding her complaint good against a general demurrer the court declared the rule of the principal case applicable.

(3) Vacation

The legislature may invest a cognizant local unit with power to vacate streets. The power will not be deemed to exist as an authority essential to the effectuation of the legal objectives of the unit nor be implied from its general authority over public ways. III Dillon, Mun. Corps. § 1160 (5th ed. 1911). Express statutory authority is generally not wanting, however. It hardly need by added that substantial compliance with the procedure prescribed by the statute is necessary. It will be recalled that, as pointed out in chapter 2, some state constitutions forbid local and special legislation relative to the laying out, alteration or vacation of streets.

It is quite apparent that private interests are likely to be actively at play when local authorities are brought to the consideration of a street vacation proposal. See Gambrell v. Chalk Hill Theatre Co., Ltd., 205 S.W.2d 126 (Tex.Civ.App.1947), appeal dismissed 334 U.S. 814, 68 S.Ct. 1071 (1948). In principle it is clear enough that the public interest must control the decision. An interesting illustration will be found in Application of Baldwin, 218 Minn. 11, 15 N.W.2d 184 (1944), where the court displayed sentimental zeal in safeguarding the shore of Lake Minnetonka against private exploitation. Estoppel has been successfully asserted against a city, which, many years after a street vacation ordinance provided a railroad company with a site for a depot, attacked the vacation as an illegal measure for private purposes. City of St. Petersburg v. Atlantic Coast Line R. Co. 132 F.2d 675 (C.C.A. 5th, 1943).

The prevailing view does not permit of the extinguishment of public rights in roads and streets by adverse possession or prescription. For a collection of cases see 4 McQuillin, Mun. Corps. § 1513 (2d ed. rev. vol. 1943). Can the effect of adverse user or prescription be achieved by resort to an estoppel formulation? Would it make any difference that a public way had or had not been actually laid out and opened to public use?

CITY OF ROCHESTER v. NORTH SIDE CORPORATION

Supreme Court of Minnesota, 1941. 211 Minn. 276, 1 N.W.2d 361.

JULIUS J. OLSON, JUSTICE. In a suit to enjoin and restrain defendants from maintaining certain buildings and structures "in or on" Broadway street north in Rochester, and that defendants "be required forthwith to remove said buildings, structures and obstructions" therefrom, plaintiff met with adverse findings. It ap-

peals from an order denying its blended motion for amended findings or a new trial.

The record is singularly free from conflict as to the facts, which may be thus summarized: In 1857 the area here involved was platted. As thereby located and dedicated, Broadway, 66 feet in width, runs in a general northerly and southerly direction along the easterly boundary of outlots 12 and 13. Until the commencement of the present suit, the city had done nothing to open to public travel the portion of the street here involved. Its dedicated purpose has remained on paper only. In fact Broadway, as laid out, constructed, and used on the ground, although 66 feet in width, is on a line deviating from the platted location "by a curve, running first east and then back again toward the west," where it again enters the platted location some distance to the north of the mentioned lots. There and there only it has been "worked and improved and maintained" as a public street "for more than 75 years" by the city, and during all these years has "been one of the principal arteries of commerce and travel between plaintiff city and the territory to the north." Not only was the street thus physically opened and maintained, but it has been used in the laying of water mains and sewers. It connects with a steel and concrete bridge across the Zumbro river substantially at the same point theretofore occupied by two wooden bridges and a later and more substantial steel bridge. The buildings sought to be removed are located, in part at least, upon the platted street fronting lot 13. At least one of the buildings has been "in its present location for more than 40 years." Defendants and their predecessors in title and interest, in reliance upon the accuracy of the physical location of the street, have in good faith erected. upon what they thought were their premises, buildings and other structures, consisting among others of a dwelling house and a gasoline filling station with the usual equipment of pumps, underground tanks, etc. These are structures "of a substantial and permanent nature and of the value of many thousand dollars, and said buildings and structures have been maintained by defendants since their erection and until the commencement of this action. without any protest or warning from plaintiff that plaintiff claimed the premises as a public street." In addition, a very substantial portion of these structures was erected in conformity with building permits granted by the city for their construction.

Under the circumstances related, the court was of the view that the city, by its inaction as to the platted street and its obvious intent to relocate it on the ground, is not now in position to maintain this action. It concluded that the city's long-continued conduct amounted to an abandonment of the dedicated street insofar as defendants' rights are involved. Accordingly, plaintiff's cause

was dismissed on its merits and judgment directed in accordance therewith.

Only one question is properly here, i. e., do the facts found by the court justify its conclusions of law? And that, too, is plaintiff's view, for in its brief it is said: "It is the contention of the plaintiff . . . that the conclusions of law are not warranted by the evidence," i. e., the facts found. In support of that position it cites and relies principally upon Parker v. City of St. Paul, 47 Minn. 317, 50 N.W. 247; Bice v. Town of Walcott, 64 Minn. 459, 67 N.W. 360, and other cases of similar import; also 4 Dunnell, Minn.Dig., 2 Ed., §§ 6620 and 6620a, and cases cited under notes.

That courts generally, and our own in particular, have jealously guarded public rights in, to, or upon public streets and other public rights dedicated to public use as against encroachments by private interests is obvious from a study of the decided cases, here and elsewhere. Obviously this was, and still is, proper and needful. While there are a few cases holding, as plaintiff contends, that "a municipality cannot by its acts or conduct be estopped to open or use a street," 25 Am.Jur., Highways, § 114, and cases under note 18, these, however, are contrary to the weight of authority. Id. and cases under note 19. The prevailing rule is that "an estoppel arises where there is long-continued nonuser by the municipality, together with the possession by private parties in good faith and in the belief that its use as a street has been abandoned, and the erection of valuable improvements thereon without objection from the municipality, which has knowledge thereof, so that to reclaim the land would result in great damage to those in possession." Id. and cases under note 20; 21 C.J. pp. 1197, 1198, 1199, § 197(h), and particularly the cases cited under note 69. Cf. 2 Pomeroy, Equity Jurisprudence, 4 Ed., §§ 818 and 821.

In Remy v. City of Chicago, 268 Ill. 597, 602, 109 N.E. 679, 681, we have a factual setup practically paralleling the situation here. There the court had for consideration the city's rights under dedication to its predecessor as against a person who claimed adversely. The court held that the statute of limitations did not apply to a city in respect to the possession of its streets and alleys since these are held "for the benefit of the public, and mere non-user or adverse possession alone cannot divest the public's rights in them." But, continued the court:

"Where, however, there are other circumstances indicating a complete abandonment by the public and the municipal authorities, and persons acting in good faith have occupied the premises under a claim of ownership for many years and in reliance upon the acts of the city have made valuable and lasting improvements which it would be inequitable to destroy, the doctrine of equitable estoppel will be applied and the public held bound by the apparent complete abandonment of its rights." (Citing cases.)

There, as here, the adverse rights claimed by the individual had been exercised and held adversely to the rights of the city without protest by anyone representing the public. Said the court: "On the contrary, the public authorities gave express permission for the construction of the building in the place where it was erected, and it would be inequitable, after the expenditure, in good faith, of a large amount of money in reliance upon the action of the public authorities and upon the nonuser and apparent abandonment of the public rights, to permit the city to take possession of the premises as a street."

Other cases sustaining that view are found in 21 C.J. p. 1197, under note 69.

It will be noted, too, that in our own case of Bice v. Town of Walcott, 64 Minn. 459, 461, 462, 67 N.W. 360, 361, this court said, by the way of dictum, however, that "we are of the opinion that in a proper case the public may be estopped by acquiescence as well as the private owner. The distinction between them is merely one of degree, and each case must depend on its own circumstances. If, for instance, the public has permitted the abutting owner to occupy a part of the street for an unreasonable length of time, and make substantial improvements thereon, such as the erection of buildings, it might, and probably would, be a case where the doctrine of estoppel by acquiescence should be applied; but we cannot hold that it should be applied in the case at bar, where the improvements consisted merely of the erection of a farm fence and the cultivation of the land inclosed by it."

Without doubt, the dedication of a public street is intended by the donor to be put to the dedicated use; otherwise there would be no useful purpose in the dedication.

Over a period of more than 83 years, even prior to our state-hood, the officers of the city have permitted the involved area to lie unused. To sustain the city's contention now, we are asked to ignore its peaceful slumber of more than three-quarters of a century and thereby to penalize defendants' work and their very substantial investments, all made in good faith. In a very important way they have contributed to the city's growth and incidentally to its treasury as owners and taxpayers of the property now sought to be taken. If estoppel is not applicable to a state of facts such as we have here, then surely that equitable principle is not of much value to property owners. As between individuals there can be no question about its applicability. We therefore unhesi-

tatingly conclude that where, as here, actual use has been publicly exercised by a physical laying out and the continual improvement and use of a street as thus laid upon adjoining property, there can be no question about the propriety and legality of the conclusion reached by the court. 25 Am.Jur., Highways, § 115, and cases under notes 10 and 11. Its order therefore is in all things affirmed.

Affirmed.

The closing of a street, for other than temporary purposes such as repair, is a responsibility of the local legislative body. Good planning procedure calls for reference of a proposed vacation to the planning board for study and report. It is so provided in the pertinent section of the City Planning Law of New York (Section 29 of the General City Law), which is quoted below. It will be noted, also, that a public hearing is required:

"Sec. 29. Official map, changes. Such legislative body is authorized and empowered, whenever and as often as it may deem it for the public interest, to change or add to the official map or plan of the city so as to lay out new streets, highways or parks, or to widen or close existing streets, highways, or parks. At least five days' notice of a public hearing on any proposed action with reference to such change in the official map or plan shall be published at least once in an official publication of said city or in a newspaper of general circulation therein. Before making such addition or change the matter shall be referred to the planning board for report thereon, but if the planning board shall not make its report within thirty days of such reference, it shall forfeit the right further to suspend action. Such additions and changes when adopted shall become a part of the official map or plan of the city, and shall be deemed to be final and conclusive with respect to the location of the streets, highways and parks shown thereon.

"The layout, widening or closing, or the approval of the layout, widening or closing of streets, highways or parks by the city under provisions of law other than those contained in this article shall be deemed to be a change or addition to the official map or plan, and shall be subject to all the provisions of this article."

(4) Control of Use—Parking and Traffic Problems

In America billboards are in keeping with the mores of a highly commercialized society. The public, broadly speaking, approves, or at least accepts them. Once the community comes to lay suf-

ficient store by aesthetic values we shall not be without legal means to protect them.

It is not a flattering commentary upon our society that it has long been questioned that aesthetic considerations alone were adequate basis for the exertion of the police power. For a collection of cases see Murphy v. Town of Westport, 131 Conn. 292, 296, 40 A.2d 177, 179 (1944). A state government, acting directly or through local units, has wide power to protect and advance the public welfare. Whether government may act to advance or protect beauty is a question which goes right to bedrock -what values do we as a community hold dear? If beauty is important to us, why need we timidly hesitate to go beyond safeguarding it as an incident to some other governmental purpose? The old billboard cases in which regulation was upheld on a public safety or morals rationalization—combustible materials might collect behind them or criminals lurk there—used a makeweight primary police power objective to protect aesthetic values. Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 37 S.Ct. 190 (1917). Note the observations of Chief Justice Brown, concurring, in Hav-A-Tampa Cigar Co. v. Johnson, 149 Fla. 148, 163, 166, 5 So.2d 433, 438, 439 (1942). The Indiana court was still clinging to this "incidental" rationale when in 1930, it upheld prospective (but not retroactive) proscription of billboards within 500 feet of any park, parkway or boulevard. General Outdoor Advertising Co. v. City of Indianapolis, 202 Ind. 85, 172 N.E. 309.

The people of Massachusetts had, however, as early as 1918 met the issue squarely by ratifying Article 50 of the Amendments to the Constitution of the Commonwealth. It reads: "Advertising on public ways, in public places and on private property within public view may be regulated and restricted by law." The regulatory scheme adopted under this provision involved construction and maintenance of outdoor signs under permits of limited life. subject to renewal as on original application. In 1935 the Supreme Judicial Court decided that a renewal permit might, without offending Fourteenth Amendment due process, be denied solely on the grounds of taste and fitness. General Outdoor Advertising Co. v. Department of Public Works, 289 Mass. 149, 193 N.E. 799, appeals dismissed on motion of appellants, 296 U.S. 543, 56 S.Ct. 95 (1935), 297 U.S. 725, 56 S.Ct. 495 (1936). George K. Gardner, "The Massachusetts Billboard Decision" 49 Harv.L.Rev. 869 (1936); Note 156 A.L.R. 581 (1945).

The Massachusetts decision bears significantly upon billboard regulation affecting existing structures. The court upheld regulations of the Town of Concord under which existing signs would have to be removed within a period of one year. See also John

H. Swisher & Son, Inc., v. Johnson, 149 Fla. 132, 5 So.2d 441 (1942). The problem is similar to that confronted in comprehensive zoning with respect to existing non-conforming uses. Consideration of the latter is reserved for the section on zoning.

Outdoor advertising is closely related to the use of streets and other public ways and places, for it is from those public areas that the signs are viewed. This is the key to an ingenious indirect attack upon the billboard problem and is the explanation for treating of billboard regulation in this section.

KELBRO, INC., v. MYRICK

Supreme Court of Vermont, 1943. 113 Vt. 64, 30 A.2d 527.

Buttles, Justice. The plaintiff corporation is engaged in the business of outdoor advertising for direct profit through rentals or compensation received for the erection, maintenance and display of painted bulletins, poster panels and other outdoor advertising devices, commonly called bill-boards, located upon real property at various places in the State of Vermont. In this suit in chancery the plaintiff prays for an injunction restraining the defendants, their agents, employes and representatives from removing certain bill-board structures erected and maintained by the plaintiff, because of alleged violations of certain provisions of the statutes regarding such structures, authority for such removal being claimed by the defendants under P.L. §§ 8352, 8353 and 8354, as amended Pub. Acts 1939, No. 221, § 7. The defendants demurred to the complaint and upon hearing the demurrer was overruled pro forma, the complaint adjudged sufficient and the defendants were enjoined until further order of the court, in accordance with the prayer of the complaint. The case comes to this Court upon the defendants' exceptions.

By their demurrer the defendants have admitted the following allegations of the plaintiff's complaint. The plaintiff has paid the fee required by P.L. § 8340 and has obtained from the Secretary of State the license required in order to engage in such business. It has erected and for a number of years has maintained bill-board structures designated as Numbers 304 and 308 on private property of one Seymour in the town of St. Albans on the easterly side of the highway known as Route 7; also a bill-board structure designated as Number 307 on private property on one Wood located on the westerly side of said highway. Each of these structures has been erected and maintained pursuant to written agreements between the plaintiff and the respective land owners. These bill-boards are not located in a city or incorporated village

or in the thickly settled part of a town or in the business part thereof as defined by P.L. § 8338, as amended, Pub.Acts 1941, No. 187, § 1. They are each 24 feet long by ten feet high, having an area of 240 square feet each.

On April 18, 1942, the Secretary of State refused to issue a renewal of the permits previously issued to the plaintiff to maintain or display advertising matter on said bill-board structures, such refusal being based upon the ground that such structures were located within 300 feet of a highway intersection and within 240 feet from the center of the travelled part of the highway, in violation of provisions of P.L. § 8350, as amended, Pub.Acts 1939, No. 221, § 6. It is conceded that all three of the bill-boards are within the forbidden distance from the center of the highway and that Numbers 308 and 304 are less than 300 feet from a highway intersection. It is the plaintiff's contention, however, that the section of the statutes referred to together with other provisions of Chapter 332, hereinafter referred to by which greater privileges are accorded, under certain circumstances, to an advertiser who is not engaged in the business of outdoor advertising for direct profit than to one who is so engaged, deny to the plaintiff the rights guaranteed to it by the constitutions of the United States and of Vermont in that they deny equal protection of the laws to it, deny due process of law, and fail to provide compensation for the taking of its private property for public use.

The established rule is that every presumption is to be made in favor of the constitutionality of an act of the legislature and it will not be declared unconstitutional without clear and irrefragable proof that it infringes the paramount law. State v. Auclair, 110 Vt. 147, 156, 4 A.2d 107; Village of Waterbury v. Melendy et al., 109 Vt. 441, 447, 199 A. 236; Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 516, 78 L.Ed. 940, 89 A.L.R. 1469.

It is necessary to consider the exact nature of the plaintiff's alleged property rights which it claims have been invaded. It is obvious that something more is claimed than the mere right to erect and maintain bill-board structures upon lands adjacent to the highway. In its essence the right that is claimed is to use the public highway for the purpose of displaying advertising matter. This fact has been well stated by the Philippine Supreme Court which has said that "the success of bill-board advertising depends not so much upon the use of private property as it does upon the use of the channels of travel used by the general public. Suppose that the owner of private property should require the advertiser to paste his posters upon the bill-boards so that they would face the interior of the property instead of the exterior. Bill-board advertising would die a natural death if this were done.

and its real dependency not upon the unrestricted use of private property but upon the unrestricted use of the public highways is at once apparent. Ostensibly located on private property, the real and sole value of the billboard is its proximity to the public thoroughfares. Hence, we conceive that the regulation of billboards and their restriction is not so much a regulation of private property as it is a regulation of the use of the streets and other public thoroughfares." Churchill and Tait v. Rafferty, 32 P.I. 580, 609, appeal dismissed 248 U.S. 591, 39 S.Ct. 20. In General Outdoor Adv. Co. v. Department of Pub. Works, 289 Mass. 149, 168, 169, 193 N.E. 799, 808, it is said: "The only real value of a sign or billboard lies in its proximity to the public thoroughfare within public view. . . . The object of outdoor advertising in the nature of things is to proclaim to those who travel on highways and who resort to public reservations that which is on the advertising device, and to constrain such persons to see and comprehend the advertisement. . . . In this respect the plaintiffs are not exercising a natural right, . . . they are seizing for private benefit an opportunity created for a quite different purpose by the expenditure of public money in the construction of public ways. . . . The right asserted is not to own and use land or property, to live, to work, or to trade. While it may comprehend some of these fundamental liberties, its main feature is the superadded claim to use private land as a vantage ground from which to obtrude upon all the public traveling upon highways, whether indifferent, reluctant, hostile or interested, an unescapable propaganda concerning private business with the ultimate design of promoting patronage of those advertising. Without this superadded claim, the other rights would have no utility in this connection." See, also, Perlmutter v. Greene, 259 N.Y. 327, 182 N.E. 5, 81 A.L.R. 1543; Fifth Ave. Coach Co. v. City of New York, 194 N.Y. 19, 86 N.E. 824, 21 A.L.R., N.S., 744, 16 Ann. Cas. 695, and an exhaustive article by Ruth I. Wilson entitled "Billboards and the Right to be Seen from the Highway", 30 Georgetown Law Journal, 743 et seq.

The plaintiff avers that its property rights, for which it claims the protection of the national and state constitutions are derived by contract from the abutting land owners, Wood and Seymour. We will consider the rights that these abutters had which they could convey, omitting, for the present, consideration of any preferential treatment that the statute may give to Wood because of his being also the owner and operator of a business located less than 500 feet from two of the billboards upon which certain goods are advertised which happen to be offered for sale in connection with that business.

The rights of an abutting owner in an adjacent street or highway are of two kinds, public rights which he enjoys in common with all other citizens, and certain private rights which arise from the ownership of property contiguous to the highway which are not common to the public in general, and this irrespective of whether the fee to the highway is in him or in the public. Certain of the latter rights constitute property, or property rights of which an abutter cannot be unlawfully deprived. While the cases involving such rights relate, mainly, to questions of ingress and egress, light and air, and lateral support, neither logic nor sound legal principle exclude the recognition of other rights equally valuable to an abutting owner. Skinner v. Buchanan, 101 Vt. 159, 165, 142 A. 72; Barnett v. Johnson, 15 N.J.Eq. 481, 487.

These private property rights are usually termed easements. Even if it can be questioned whether they are true easements in the strictest sense they are at least rights in the nature of appurtenant easements, the abutting property being the dominant and the highway the servient tenement, and they are governed by the law of easements. An important right of this nature is the abutter's right of view to and from the property, from and to the highway; that is, his right to see and to be seen. This right of reasonable view has been generally recognized by the weight of authority and has been protected in numerous cases where encroachments on streets or sidewalks obscured the visibility of signs, window displays or show cases. Among such cases may be cited First Nat'l. Bank v. Tyson, 133 Ala. 459, 32 So. 144, 59 L.R. A. 399, 91 Am.St.Rep. 46; Klaber v. Lakenan, 8 Cir., 64 F.2d 86, 90 A.L.R. 783; Perry v. Castner, 124 Iowa 386, 100 N.W. 84, 66 L.R.A. 160, 2 Ann.Cas. 363; Bischof v. Merchants Nat. Bank, 75 Neb. 838, 106 N.W. 996, 5 L.R.A., N.S., 486; Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P. 330; Yale Univ. v. City of New Haven, 104 Conn. 610, 134 A. 268, 47 A.L.R. 667; Davis v. Spragg, 72 W.Va. 672, 79 S.E. 652, 48 L.R.A., N.S., 173. See 25 Am.Jur. Highways, Secs. 155 and 319. While authority contra may be found we are in accord with the rule above stated which we believe to be the sounder and more logical one. It is to be noted that in each of the authorities above cited this right is designated an easement.

It is said in Goddard on Easements, p. 383, 8th Ed., that "a right of way appurtenant to a dominant tenement can be used only for the purpose of passing to or from that tenement. It cannot be used for any purpose unconnected with the enjoyment of the dominant tenement, neither can it be assigned by the dominant owner to another person and so be made a right in gross, nor can he license anyone to use the way when he is not coming to or from the dominant tenement." McCullough v. Broad Exch.

Co., 101 App.Div. 566, 92 N.Y.S. 533, affirmed 184 N.Y. 592, 77 N. E. 1191; Bang v. Forman, 244 Mich. 571, 222 N.W. 96; Miller v. Weingart, 317 Ill. 179, 183, 147 N.E. 804, 805, 806. While this principle has been applied most frequently to rights of way it is applicable to other appurtenant easements and should, in our opinion, be applied in the present case where the servient tenement is the public highway, built with public funds, designed for public use, and under the exclusive regulation and control of the Legislature. Especially is this so since it is a principle which underlies the use of all easements that the owner of the easement cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden. 17 Am.Jur. Easements, § 98; Hopkins the Florist Inc. v. Fleming, 112 Vt. 389, 391, 26 A.2d 96; Dernier v. Rutland Ry. L. & P. Co., 94 Vt. 187, 194, 110 A. 4.

The result, as to the claim here made, is that the right of view of the owner or occupant of the abutting property is limited to such right as is appurtenant to that property and includes the right to display only goods or advertising matter pertaining to business conducted thereon. This appurtenant easement does not include the right to display advertising matter foreign to a business conducted on the property, and he could not convey to this plaintiff a right that he did not himself possess.

The greater privileges accorded to advertisers who are not engaged in the advertising business for direct profit, to which we have referred, are to be found in P.L. c. 332, Sections 8340, 8341, 8342, 8343, as amended, Pub.Acts 1941, No. 187, § 2, 8349 as amended Pub.Acts 1941, No. 187, § 4, and 8350, as amended Pub. Acts 1939, No. 221, § 6. They include preferential treatment as to payment of license fees and obtaining permits; as to the required distance from the abutting highway and from intersecting highways, of bill-boards upon which are displayed advertisements of goods manufactured or offered for sale or of a business carried on within 500 feet thereof; also as to advertisements by or on behalf of a municipality, by common carriers upon certain kinds of property and as to highway lighthouses and purely direction signs.

That the Legislature has seen fit to extend these privileges cannot avail this plaintiff. They are a matter of sufferance rather than of right. The plaintiff is admittedly not in the excepted class, but is, rather, seeking to use the highway for commercial purposes analogous to the use made of it by common carriers. Such use, this Court has held, the Legislature in the exercise of its police powers may wholly deny, or may permit to some and deny to others as will best promote the general good of the public. There is no inherent right to use the highways for commercial

purposes. State v. Gamelin, 111 Vt. 245, 250, 251, 13 A.2d 204; In re James, 99 Vt. 265, 270, 132 A. 40, 44; State v. Caplan, 100 Vt. 140, 155, 135 A. 705. This is in accord with the holdings of the United States Supreme Court which has recently said: "Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated." Valentine v. Chrestensen, 316 U.S. 52, 54, 55, 62 S.Ct. 920, 921, 86 L.Ed. 1262.

No invasion of the plaintiff's constitutional rights appears. Decree reversed. Defendant's demurrer sustained; injunction dissolved and plaintiff's bill of complaint dismissed.

On Motion for Reargument.

After the foregoing opinion was handed down the plaintiff, upon leave duly obtained, moved for a reargument, basing its motion upon several grounds.

The plaintiff is in error in saying that the opinion proceeds on the theory that an easement was created between the plaintiff and the abutting land owners. We merely assumed the correctness of the averment in the complaint that the billboard structures in question were erected and maintained pursuant to written agreements between the plaintiff and the respective land owners. We made no finding or assumption, and did not consider it necessary to do so, as to the relationship created by such agreements between the parties. It appears, however, that the plaintiff did not become the agent or servant of the abutters. No doubt the plaintiff is correct in saying that an easement between them was not created.

The plaintiff urges that by the concluding clause in our quotation from the opinion in Churchill and Tait v. Rafferty, 32 P.I. 580, 609, we conceded that private rights are here secondarily involved. We do not think that inference is warranted but if it were it needs no argument to demonstrate that claimed private rights must yield so far as they are inconsistent with paramount public rights. We consider that in the present case there is such inconsistency. It should be noted that we did not follow in toto the reasoning either of the Churchill case or of General Outdoor Adv. Co. v. Department of Public Works, 289 Mass. 149, 193 N.E. 799. We merely adopted the trenchant and accurate language

used in those opinions to describe the nature of the claims which this plaintiff is making. Upon reading the Massachusetts constitutional amendment to which the plaintiff refers it becomes obvious that it had nothing to do with the use of the language quoted from the latter case.

Our holding that the right which the plaintiff here claims is in the nature of an easement appurtenant to the abutting land and servient upon the public's interest is challenged upon several grounds. It is said that this holding is inconsistent with the fact that the fee to highways in this State is in the abutting owners, subject to the use by the public for highway purposes. While it is true that this is the general rule it is not the universal rule in Vermont or elsewhere. In Skinner v. Buchanan, 101 Vt. 159. 142 A. 72, the premises involved abutted upon the street but did not include the fee to any part of that street, and in Ferre v. Doty, 2 Vt. 378, it appeared that the plaintiff, who had the fee to abutting land, had no fee to any part of the adjoining common, which was held to be in some respects similar to a highway. The record before us does not disclose whether in the present case the fee to the highway is in the public or in one or the other or both of the abutting owners.

Furthermore, it is stated in Skinner v. Buchanan, supra, as set forth in the foregoing opinion, that the abutting owner has certain special rights in the highway irrespective of whether the fee to the highway is in him or in the public. The right of view is of the same nature as those referred to in that statement and has often been included with them. There is abundant authority for the statement in the Skinner case. See 29 C.J. 547; Donahue v. Keystone Gas Co., 181 N.Y. 313, 320, 321, 73 N.E. 1108, 70 L.R.A. 761, 106 Am.St.Rep. 549; Anzalone v. Metropolitan Dist. Comm., 257 Mass. 32, 36, 153 N.E. 325, 47 A.L.R. 897; City of Denver v. Bayer, 7 Colo. 113, 2 P. 6; Town of Norwalk v. Podmore, 86 Conn. 658, 86 A, 582; Brakken v. Minneapolis & St. L. Rv. Co., 29 Minn. 41, 42, 11 N.W. 124; 4 McQuillin, Munic.Corp., 2nd Ed., § 1426; 3 Dillon, Munic.Corp., 5th Ed., § 1136, where it is said: "The later and best considered judgments hold that it is comparatively unimportant, as respects the relative rights of an abutting owner and the public in and over streets, whether the bare fee is in the one or the other. If the fee is in the public, the lawful rights of the adjoining owners are in their nature equitable easements: if the fee is in the abutter, his rights in and over the street are in their nature legal; but in the absence of controlling legislative provisions, the extent of such right is, in either event. substantially, perhaps precisely, the same."

The rules stated in the opinion by which dominant easements are restricted apply here if the rights of the abutter are such

easements. If they are not true easements because of the fee of the highway being in the owner of the rights, those restrictions are equally applicable, since "the extent of such rights is, in either event, substantially, perhaps precisely, the same." The plaintiff invokes the rule, often stated in the books, that an owner cannot have an easement in his own land. If the fee of the highway is in the public the abutter's easement would not be in his own land, but if the fee is in him the extent of his rights, as above stated is the same. In that event the situation is somewhat analogous to that which sometimes results in the creation of an implied easement. Strictly speaking, a man cannot subject one part of his property to another part by an easement, on the theory that he cannot have an easement in his own land, but if he makes one part of it servient to another by an alteration which is obvious and permanent or apparent and continuous, and then conveys one of the parcels, his grantee takes such part benefited or burdened by the easement which the alteration created. Provident Mut. Life Ins. Co. v. Doughty, 126 N.J.Eq. 262, 265, 8 A.2d 722, 724; 17 Am.Jur., Easements, § 32.

The plaintiff seems to have misunderstood the opinion in one respect. We discussed only the abutter's right of view to and from the highway and did not intend to assert any corresponding right of view on the part of the public. One sentence of the opinion has been amended to prevent any such misapprehension. The plaintiff's statement that an easement must be created for the benefit of corporeal property is, therefore, not at variance with the opinion.

The right of view was, as the plaintiff asserts, in existence before the billboard structures were erected. The manner in which the plaintiff has sought to increase the servitude of that right fully appears, we think, from the opinion.

We make no assumption as to the purpose for which the land may have been rented to the plaintiff. The demurrer admits the averment of the complaint that the use to which the land has been put by the plaintiff is pursuant to written agreements with the land owners, and it does not appear that that use by the plaintiffs is connected with the enjoyment or use of the land by its owners. It is alleged that Wood owns the land upon which bill-board number 307 is erected, but the fact that he sells gas and oil at retail at a building more than 500 feet distant and across a road from that billboard, upon which gas and oil are advertised, does not establish such connection. It does not appear that the brands of gas and oil advertised are the same brands sold by Wood, nor that if they are the same brands attention is called by the advertisement to his station as a place where they may be bought. Apparently the billboard advertises Wood's business no

more than it does thousands of others—even less if the brands of gas and oil are different.

The record does not indicate that the plaintiff in displaying this advertisement was acting as the agent or servant of Wood, but rather that it acted independently in furtherance of its own business which Wood had by contract attempted to give the plaintiff the right to conduct at that location. It is not necessary to assume aesthetic considerations for the enactment of restrictions which apply to this billboard. In the view we take the Legislature's undoubted right to restrict or forbid the use of highways for commercial purposes sufficiently justifies such enactment. The classification, for legislative purposes, of a person, firm or corporation engaged in the business of outdoor advertising for direct profit through rentals or compensation in a class apart from one engaged in advertising, not for such direct profit but for the purpose of fostering a local business, a community enterprise or public safety, is clearly not unconstitutional, the object sought by the Legislature being, it may be assumed, the limitation of the use of highways for commercial purposes. State v. Auclair, 110 Vt. 147, 160, 4 A.2d 107; State v. Haskell, 84 Vt. 429, 437, 79 A. 852, 34 L.R.A., N.S., 286; State v. Hazelton, 78 Vt. 467, 471, 63 A. 305. Mr. Wood is therefore properly placed in a different class from this plaintiff, even if it be true that because he sells coca-cola and Chesterfield cigarettes at his store he could lawfully advertise those products—which the plaintiff advertises -upon billboards "identical in size and location" with two of those maintained by this plaintiff.

The fundamental trouble with the plaintiff's position is that it claims certain property rights in the highway which we hold do not exist to the extent claimed.

The plaintiff's motion for reargument is denied. Let full entry go down.

In Murphy, Inc., v. Town of Westport, 131 Conn. 292, 40 A.2d 177 (1944), an advertising company sought to enjoin enforcement of the provisions of a zoning ordinance proscribing bill-boards in a business zone. In granting judgment for the plaintiff the trial court relied largely upon the conclusion that an exception in favor of a billboard which referred to a business conducted on the premises rendered the ban discriminatory. The Supreme Court of Errors rejected that conclusion and sent the case back so that the facts could be developed. The court sought, in remanding, to make it plain that it did not embrace the theory developed in the Myrick Case. As to that it had this to say: "The argument is that the value of the use of land abutting on a

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highway for the location of a billboard is entirely dependent upon its visibility from the highway, that all the abutting owner can claim is a right to have that condition continued, that this is in the nature of an easement appurtenant to the land, but that the right is restricted to the display of advertising matter related to business conducted on the premises, and does not include advertising foreign to such a business, and that, therefore, the landowner cannot confer upon another the right to maintain a billboard upon which advertising of the latter kind is displayed. This argument is more fully delevoped in an article by Ruth I. Wilson, 30 Georgetown L.J. 723. The Vermont Court, citing among other cases Yale University v. City of New Haven, 104 Conn. 610, 134 A. 268, 47 A.L.R. 667, says (at page 69 of 113 Vt., at page 530 of 30 A.2d): "This right of reasonable view has been generally recognized by the weight of authority and has been protected in numerous cases where encroachment on streets or sidewalks obscured the visibility of signs, window displays or show cases.' It regards this right, as indeed we do in the Yale University case, as in the nature of or at least analogous to an easement, and states that it is as such appurtenant to the land of the abutter. As regards the incident of visibility, we are not able to see wherein there is any essential difference between advertising the landowner's own business and advertising the business of another. The use of land abutting upon a highway for the maintenance of a billboard advertising the business of another than the owner is lawful and may bring a definite increment of value to the land. As an incident to the land which serves its beneficial use, the right is appurtenant to it. Graham v. Walker, 78 Conn. 130, 135, 61 A. 98, 2 L.R.A., N.S., 983, 112 Am.St.Rep. 93, 3 Ann.Cas. 641; Lindenmuth v. Safe Harbor Water Power Corporation, 309 Pa. 58, 64, 163 A, 159, 89 A.L.R. 1180; Goodwillie Co. v. Commonwealth Electric Co., 241 Ill. 42, 74, 89 N.E. 272; Jones, Easements, Sec. 18; see Whittelsey v. Porter, 82 Conn. 95, 102, 72 A. 593. . . The right of visibility as related to the use of land for advertising, whether it be of a business located on the premises or one not so located, is in the nature of an easement appurtenant which attaches to the land and every part of it: that right is within the protection of constitutional guaranties, State of Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121, 49 S.Ct. 50, 73 L.Ed. 210; and one who leases the whole or a part of the land for the purpose of erecting a billboard on it acquires the same right the owner had. Phoenix Nat. Bank v. United States Security Trust Co., 100 Conn. 622, 630, 124 A. 540, 34 A.L.R. 963; Sieger v. Riu, 123 Conn. 343, 347, 195 A. 735."

Public safety may be employed as the police power objective to be furthered by restrictions or prohibitions upon signs which may obstruct the vision or distract the attention of drivers of motor vehicles. The leading case is Perlmutter v. Greene, 259 N.Y. 327, 182 N.E. 5 (1932) (highway authorities proposed to put a screen on right of way in front of large billboard near curve in narrow road; injunction denied). See also Hav-A-Tampa Cigar Co. v. Johnson, 149 Fla. 148, 5 So.2d 433 (1942) and companion case.

Where the view of the Connecticut court, expressed in the Town of Westport case, prevails, the freeway technique of acquiring all access rights can be used, at added public expense, to solve the billboard problem. A parkway, which consists of a narrow recreational area with a road running through it, achieves the same result.

Under modern comprehensive urban zoning outdoor advertising signs can be excluded from residential zones and confined to commercial and industrial areas. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114 (1926). This is true of small professional signs. Kort v. Los Angeles, 52 Cal.App.2d 804, 127 P.2d 66 (1942) (accountant); Lexington v. Govenar, 295 Mass. 31, 3 N.E.2d 19 (1936).

There has been considerable support for a type of piecemeal zoning, known as roadside zoning, designed to prevent billboards and various commercial uses of private land along the highways. It has, however, received little legislative attention, due, it may well be, to the opposition of people in the rural areas as well as the outdoor advertising interests. Edward M. Bassett, Zoning 11 (1940). It is noteworthy that the Ohio county rural zoning law, as finally enacted in 1947, contains provisions which not only exempt from regulation the use of land for agricultural purposes but also affirmatively ordain that outdoor advertising shall be permitted on lands used for agricultural purposes. Ohio Gen. Code § 3180–19 and 20 (Page, Supp.1947).

Still another possibility is recourse to the power of taxation. If a tax may be levied to discourage the oleomargarine business, doubtless the same could be done as to outdoor advertising.

CITY OF CHICAGO v. McKINLEY

Supreme Court of Illinois, 1931. 344 Ill. 297, 176 N.E. 261.

DUNN, C. J. William McKinley, the plaintiff in error, was found guilty in the municipal court of Chicago of a violation of section 3855 of the Chicago municipal code of 1922 by permitting an automobile to stand for a period of time longer than was necessary for the reasonably expeditious loading or unloading of passengers and for a greater length of time than three minutes, in

front of 167 West Quincy street, within the area of restricted parking established by the ordinance. It was shown that he drove his car, a passenger sedan, in Quincy street and stopped at No. 175, between Wells and La Salle streets, about 2:10 p.m., and went into the building, leaving the car standing there until 2:40 p.m. The ordinance is in the following language:

"An Ordinance amending Section 3855 of the Chicago Municipal Code of 1922 as amended.

"Be it ordained by the city council of the city of Chicago, section 1. That section 3855 of the Chicago municipal code of 1922 as amended by ordinance entitled 'An ordinance amending section 3855 and repealing section 3856 of the Chicago municipal code of 1922,' passed December 14, 1927, be and the same is hereby amended to read as follows:

"3855. Parking Prohibited on Certain Streets During Certain Hours.—On and after March 28, 1929, no person, firm or corporation owning, controlling, driving or operating any passenger vehicle shall cause or permit such vehicle to stand for a period of time longer than is necessary for the reasonably expeditious loading or unloading of passengers, provided such loading or unloading shall not consume more than three minutes; or to stand any commercial vehicle for a period of time longer than is necessary for the reasonably expeditious loading, unloading and delivery or pickup of materials, provided such loading, unloading and delivery or pick-up shall not consume more than thirty minutes, on any public street or alley in the city of Chicago within the district bounded on the north by the south line of Wacker drive, on the east by the west line of Michigan boulevard, on the south by the south line of Harrison street, on the west by the east line of Market street, nor upon the upper level of Michigan avenue between the north line of Randolph street and the south line of Wacker drive, during the hours from 7:00 o'clock A.M. to 6:00 o'clock P. M. of any day except Sundays, New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day, and except on Saturdays when the restriction within the above designated area shall be in force from 7:00 o'clock A. M. to 3:00 o'clock P. M.; provided that this section shall not apply to any duly licensed taxicab when standing in any cabstand fixed by ordinance; provided, further, that it shall not apply to any ambulance nor to any emergency vehicle of the city of Chicago. Federal government, the county of Cook, or to the vehicle of any public utility while the operator of any such vehicle is engaged in the necessary performance of emergency duties; and further provided, that this section shall not apply to any vehicle brought to a stop to avoid collision, or standing in compliance with the orders

of any public officer or the direction of any traffic control signal. Any person, firm or corporation that shall violate or fail to comply with the provisions of this section shall be fined not less than \$1 nor more than \$25 for each offense."

The defense was that the ordinance is unreasonable, and that it is void upon the ground that it is an amendment of a void ordinance.

As appears from the ordinance set out above, it is an amendment of section 3855 of the Chicago municipal code of 1922 as amended, which was the ordinance held unreasonable, and therefore invalid, in Haggenjos v. City of Chicago, 336 Ill. 573, 168 N. E. 661, the opinion in which was filed October 19, 1929. The ordinance which was the basis of the prosecution in that case provided that no person, firm, or corporation, owning, controlling, driving, or operating any vehicle propelled either by animal or other power, shall cause or permit such vehicle to stand on any public street or alley in Chicago within the district and during the periods of time covered by the ordinance. The provision of the present ordinance, passed March 18, 1929, is, that no person, firm, or corporation, owning, controlling, driving, or operating any passenger vehicle, shall cause or permit such vehicle to stand for a period longer than is necessary for the reasonably expeditious loading or unloading of passengers, provided such loading or unloading shall not consume more than three minutes; or to stand any commercial vehicle for a period of time longer than necessary for the reasonably expeditious loading or unloading and delivery or pick-up of materials, provided such loading, unloading, and delivery or pick-up shall not consume more than thirty minutes. The amending ordinance also contained a proviso not found in the former ordinance that the "section shall not apply to any vehicle brought to a stop to avoid collision, or standing in compliance with the orders of any public officer or the direction of any traffic control signal." In all other respects, so far as this case is concerned, the ordinance is the same as that held invalid in the Haggenjos Case, and the only question presented is whether the vice of the former ordinance is corrected by the substitution for the words of prohibition in it, "no person, firm or corporation owning, controlling, driving or operating any vehicle, propelled either by animal or other power, shall cause or permit any vehicle to stand on any public street or alley" within the boundaries and during the time stated in the ordinance, the words of prohibition in the amended ordinance that "no person, firm or corporation owning, controlling, driving or operating any passenger vehicle shall cause or permit such vehicle to stand for a period of time longer than is necessary for the reasonably expeditious loading or unloading of passengers, provided such loading or

unloading shall not consume more than three minutes; or to stand any commercial vehicle for a period of time longer than is necessary for the reasonably expeditious loading, unloading and delivery or pick-up of materials, provided such loading, unloading and delivery or pick-up shall not consume more than thirty minutes." The territory covered by the two ordinances is the same and the hours are the same, except that 6 p. m. in the new ordinance is substituted for 6:30 p. m. in the old.

The violation of the ordinance occurred between Wells and La Salle streets. The building of the Central Trust Company occupies the entire south side of Quincy street in that block. It is twenty-two stories high, and there is considerable traffic of patrons of the bank stopping there and of Brinks express wagons taking money to and from the Federal Reserve Bank on the opposite side of the street. Big trucks also unload coal on the north side of the street. On the northwest corner of La Salle and Quincy streets is the Federal Reserve Bank building, extending west on Quincy street about 100 feet, and immediately west of it is the Old Colony Life building, occupying the remainder of the block—about 200 feet. The Federal Reserve Bank building is occupied in part by the Federal Reserve Bank and on several of its floors are private offices. The Old Colony Life building has fifteen stories, the lower four occupied by the offices of the Old Colony Life Insurance Company and the upper eleven stories used for offices. The street is 45 feet wide. La Salle and Wells streets where they intersect Quincy are busy streets. Wells is a through street, on which are both surface and elevated railway lines.

The plaintiff in error argues that an ordinance prohibiting all passenger vehicles from standing for any length of time except the time required to load or unload passengers, not exceeding three minutes, during an entire business day over an area of seventy-two city blocks, is unreasonable and void, and that this case is controlled by the Haggenjos Case, notwithstanding the amendments to the ordinance. The amendments were passed before the decision in the Haggenjos Case was rendered, and could not, therefore, have been made with that decision in view. The first question presented in the brief is, therefore, whether the change made by the amendments of March 18, 1929, saves the amended ordinance from invalidity under the Haggenjos Case, and the plaintiff in error insists that it does not; that to prohibit the standing of any vehicle for any purpose except for loading or unloading amounts substantially to total prohibition. It does amount to total prohibition of the use of the street for the parking or storage of vehicles. The argument of the plaintiff in error is that the amended ordinance prohibits standing for any purpose except as an incident of traffic; that no person having any business in the loop can stop his automobile during any business day for any length of time for the transaction of business or for any purpose except as an incident of transportation; that he must keep traveling, and his only business must be that of traveling, and the question is asked, Is such an ordinance a reasonable exercise of power by the city? A negative answer to this question must be based upon the premise that persons using the street for personal transportation have a right to park their vehicles on the street for their convenience while they leave them for the transaction of business with the merchants, lawyers, stores, banks, hotels, and the occupants of offices and buildings in the street. . . .

We held in the Haggenjos Case that the city had the power to regulate the use of the streets and the traffic upon them and to prevent the obstruction of them, that it was clear that some regulation of the standing of vehicles on the street was necessary for the safety, welfare, and convenience of the public, and that it was the duty of the city council to determine what regulation was required for the public welfare; the only limitation upon the exercise of this power being that it should be reasonable. Because the ordinance in that case, amounting to a prohibition of standing vehicles on the street during the whole of every business day, was unreasonable, that ordinance was held to be invalid. The ordinance in question here is not subject to the same criticism. It allows stopping for the discharging and taking on of passengers not exceeding three minutes and for the loading and unloading of materials not exceeding thirty minutes.

No doubt it often would be convenient for a person to leave his car temporarily at the curb for such time as suits his convenience while he walks across the sidewalk to do an errand, make a purchase, leave a message, make an appointment, telephone, or attend to some other business in his own or some other person's office, but, if one person may do it, so may every other person, and soon the curbs on both sides of the street might be lined with parked automobiles, the street crowded, traffic clogged, and great inconvenience caused to all persons having occasion to use the street for its primary and legitimate purpose. There is no such right of individuals so to park their cars on the street which may not be regulated by ordinance. Parking may be regulated as to time when, place where, and length of time permitted, due consideration being given to the necessities and convenience of those desiring to use the streets for going from one place to another. and of those who desire to use them for the transportation, delivery, and shipping of merchandise, materials, fuel, and supplies and the character of the traffic affected.

This ordinance applies to seventy-two blocks, which include the loop district in the city of Chicago. The plaintiff in error con-

tends that the extension of the ordinance over all this territory is unreasonable. The plaintiff in error testified that Quincy street was not a busy street, but the officer who was the only other witness in the case testified that, beginning in the morning, it was a very busy street until 3 o'clock in the afternoon. It is argued that, while in certain streets or parts of streets in the loop no parking should be allowed at any time, in Quincy street between La Salle and Wells where there is practically no traffic at all during the business day, parking might very well be allowed at all times, and again at different times of the business day the same street may require or admit of different kinds of regulation. This argument is not based on the evidence, which does not show that there is practically no traffic during the business day on Quincy street between La Salle and Wells. The city council had the right to regulate the use of the streets by ordinances, so as to prevent, as far as possible, the loss and inconvenience arising from traffic congestion. It was for the council to determine what means should be adopted to remove the causes of such congestion, and its determination of such means cannot be disturbed, unless the means adopted are unreasonable. It is the province of the council to decide in what streets or parts of streets, during what hours, and for what length of time, limitation of the right to park or allow a vehicle to remain standing on the street is necessary to a proper regulation of traffic, and we are not justified in holding those contained in the ordinance to be unreasonable, unless they are clearly so, and in our judgment this cannot be said of them.

The judgment is affirmed.

Judgment affirmed.6

There was a day when domestic animals running at large in the streets presented a municipal problem. Impounding was employed as an effective sanction supporting a ban upon the permitting of that sort of thing. Recently the same device has been used with respect to illegally parked motor vehicles. The owner may be burdened with an impounding fee and storage charge. Hughes v. City of Phoenix, 64 Ariz. 331, 170 P.2d 297 (1946), citing other cases.

Measures such as that under attack in the principal case represent but one of many types of regulations designed to promote the safe and expeditious flow of traffic on busy streets and roads.

⁶ An interesting collateral point was made in this case. It was urged that the amendatory ordinance was necessarily ineffectual since the original ordinance had been declared invalid. The amendatory ordinance was, however, a complete regulation and the court found no substance in the objection.

It is the sphere of the modern traffic engineer to explore them thoroughly in making studies and suggestions with a view to bringing about the most effective use of the existing street system. Projection of improvements in the street system is a planning function.

Usually the rules of the road and speed limits are established on a state-wide basis by or pursuant to state law. Local regulation more drastic than the state provisions may, in some states, exist alongside the latter. The problem of conflict or consistency with general law has already been considered under the head of home rule. The issuance, suspension and revocation of drivers' licenses are also conducted as a state function.

If within its grant of powers made by positive law a local unit may resort to a variety of familiar devices such as traffic signals, stop signs, pavement lane markings, safety zones, one-way streets, routing of through traffic around congested areas, segregation of heavy and light vehicles, safety zones and complete or rush-hour parking bans with respect to busy streets.

Questions have been raised as to the validity of delegations of authority to administrative officers to make regulations of this character. In a given jurisdiction the only safe answer may be direct legislative enactment by the local governing body. In others the establishment of an intelligible standard to govern administrative discretion might suffice. See City of Shreveport v. Herndon, 159 La. 113, 105 So. 244 (1925); City of Chicago v. Marriotto, 332 Ill. 44, 163 N.E. 369 (1928); City of Cleveland v. Gustafson, 124 Ohio St. 607, 180 N.E. 59 (1932).

The production of revenue has, doubtless, been an influential factor in the rapid spread of the parking meter system since the initial installation in 1935. Theoretically, of course, the meter charge is made under the police power and must be commensurate with the cost of regulation. Actually, however, it is a commonplace that some cities are "making money" out of the meters. It must be remembered that the revenue situation of municipalities is relatively quite bad and there is strong temptation to seize upon even a rather limited new source of income. The Municipal Year Book 1948 (at p. 431) reports that, as of late 1947, there were 888 cities of over 5,000 in the United States, which had parking meter installations. This represented an increase during the year of 271 and the aggregate almost trebled the 1942 total of 320. The Year Book shows gross collections of 452 reporting cities for a single month, September 1947. The total amounted to \$1,845,230. The prevailing practice is to credit such receipts to the general fund.

WILLIAM LAUBACH & SONS v. CITY OF EASTON

Supreme Court of Pennsylvania, 1943. 347 Pa. 542, 32 A.2d 881.

Parker, Justice. Four bills in equity were filed and the issues raised were tried together in the court below. They were so considered here on argument and, as they all involve the same fundamental questions, the appeals will be disposed of in one opinion. Plaintiffs sought to enjoin defendant from putting into operation an ordinance providing for the installation of parking meters in a congested section of the city of Easton, and asked for the removal of such meters if they were installed before the entry of the decree sought. Three of the bills were brought by owners of property abutting on streets in the meter zone and the fourth was a taxpayer's bill. The chancellor, affirmed by the court below, dismissed the bills. We agree with that conclusion.

The ordinance is attacked generally as being in violation of abutting owners' constitutional rights of property and as a deprivation of legal rights of plaintiffs and of all those entitled to use the public highways of the Commonwealth. Complaint is also made to its particular terms which are alleged to be illegal even if a proper parking meter ordinance could be enacted.

This is the first time that the legality of a parking meter ordinance, now so generally used, has been before this court,7 but the underlying principles are fairly well settled in this jurisdiction. The ordinance by its preamble declared that in certain sections of the city the free movement of traffic had been impeded for a long period, that attempts to regulate it were not successful, that the existing conditions were a menace to life, limb and property, and that in the opinion of the council the best method to correct these conditions was to designate individual parking spaces in the congested area for parking purposes "for reasonable intervals of time" and to require the users of such space to pay "a portion of the cost of establishing and maintaining the same". The ordinance then provided for the installation of registering meters and a charge of one cent for twelve minutes and five cents for one hour. It did not permit parking for more than one hour in the designated area. Parking space was to be free "for loading and unloading purposes", and free parking was permitted on holidays and after business hours. Penalties were provided for violation of the terms of the ordinance.

It is first contended that an abutting property owner ordinarily has title to the fee to the center of the highway subject to the

 $^{^7\,[{\}rm Footnotes}$ renumbered.] For cases in other jurisdictions see Notes. 108 A.L.R. 1152, 130 Id. 316.

public easement and that, therefore, the right of way may only be employed by the state for the purposes for which it was taken, and that, specifically, each property owner and his business and social guests have the right to park their motor vehicles on the streets in front of such property for a reasonable time free of any charge.

When land is taken for use as a highway the owner does not surrender his entire title to the land so taken but reserves rights above, below and on the surface that do not interfere with the use of such land for highway purposes. Cain v. Aspinwall-Delafield Co., 289 Pa. 535, 539, 137 A. 610. He may prevent an unlawful use of the highway. Hopkins v. Catasauqua Mfg. Co., 180 Pa. 199, 201, 36 A, 735; Breinig v. Allegheny Co., 332 Pa. 474, 478, 2 A.2d 842. He may even use in a reasonable manner the surface of the street temporarily for purposes necessarily incident to the abutting land, e.g., storing building material. Mallory v. Griffey, 85 Pa. 275; Piollet v. Simmers, 106 Pa. 95, 51 Am. Rep. 496. "Even where the state, by purchase or eminent domain, acquires a fee in the land upon which the highway rests, the abutting owner may prevent such unlawful uses of the street in front of his premises as amount to private nuisances, such as parking. But, the use of the highway by the public for transit is free from restriction by the abutting owner or others". Breinig v. Allegheny Co., supra, 332 Pa. at page 479, 2 A.2d at page 846. The abutting owner has also by the same authority (332 Pa. at page 481, 2 A.2d 842) the right of approach to his property subject to regulations by the state under its police powers. It is well settled here that the servitude imposed by the easement of public passage on city streets is necessarily greater than that imposed in the open country. McDevitt v. People's Nat. Gas Co., 160 Pa. 367, 374, 28 A. 948; Pennsylvania R. R. Co. v. Montgomery Co. Pass. Ry., 167 Pa. 62, 70, 31 A. 468, 27 L.R.A. 766, 46 Am.St.Rep. 659. At the same time the public has a paramount right to travel over a public highway.

In a congested district there is bound to be an interference between the rights of those who are lawfully using the public highways and abutting owners just as there are between different travellers and between different abutting owners. It is due to these impacts that the state under its police power may regulate the use of highways in the interest of the whole public in so far as such regulations are not unreasonable or oppressive.

The advent of the automobile with its element of speed has added to the difficulties that are met in any attempt to maintain an orderly movement of traffic. The remarks of Mr. Justice McReynolds are peculiarly applicable where he said in Frost v. Railroad Comm., 271 U.S. 583, 603, 46 S.Ct. 605, 610, 47 A.L.R. 457: "The

states are now struggling with new and enormously difficult problems incident to the growth of automotive traffic, and we should carefully refrain from interference unless and until there is some real, direct and material infraction of rights guaranteed by the federal Constitution."

The first question that arises in solving the issue raised here is whether parking a motor vehicle on a public street is within the purposes of the public easement. Highways are primarily for travel. As Lord Ellenborough said in an early case, Rex v. Cross, 3 Camp. 224, 227: "No one can make a stable-yard of the King's highway." To paraphrase that statement as applied to the present day: "No one may make a public garage of a public highway." That, however, is not the situation here, for today temporary and reasonable stops of motor cars are lawful incidents of travel. It would unduly interfere with convenient travel by motor car if one could not stop for a short interval for the accomplishment of the purpose or purposes of the trip. "Doubtless temporary and reasonable stops of automobiles on highways are lawful as an incident to travel". In re Opinion of the Justices, 297 Mass. 559, 8 N.E.2d 179, 182. We have no doubt of the soundness of the conclusion that stops of reasonable length which do not interfere with traffic and are not contrary to established police regulations are a reasonable use of public highways, when we note that the public easement has been held to include the right to lay sewer, gas, water and telegraph lines and street car tracks in city streets. Everyday experience demonstrates the accuracy of that statement. Assuming that such stops may overtax the capacity of streets most of which were laid out in a different age and that conflicts of rights are bound to arise, the state in the exercise of its police power may adopt reasonable regulations for the purpose of meeting the situation. It is that inherent power which the state has invoked here. Farmers-Kissinger Market House Co. v. Reading, 310 Pa. 493, 165 A. 398. We deem it to be the law that the state has the same right to regulate parking that it has to limit the speed of automobiles, so long as the regulations are not oppressive or unreasonable.

The declared purpose of this act is not to promote parking but to limit parking in the interest of all travellers on the public highways. The recital of the purpose in the ordinance is not to be lightly set aside and must be treated as conclusive of the existence of the facts recited in the absence of strong evidence to the contrary. In re Beechwood Ave., 194 Pa. 86, 45 A. 127; Duquesne Light Co. v. Pittsburgh, 251 Pa. 557, 97 A. 85, Ann.Cas.1917E, 534; American Baseball Club of Phila. v. Philadelphia, 312 Pa. 311, 315, 167 A. 891, 92 A.L.R. 386; Statutory Construction Act of

May 28, 1937, P.L. 1019, \S 54, 46 P.S. \S 554. There is no evidence to the contrary.

The state has delegated to municipalities its police power in such matters, which it has a right to do. By § 1103 of the Vehicle Code of May 1, 1929, P.L. 905, 75 P.S. § 663, it is provided that "local authorities shall have power to provide by ordinance for the regulation of traffic by means of peace officers or official traffic signals on any portion of the highway where traffic is heavy or continuous, and may regulate or prohibit parking, stopping or loading of vehicles." [Italics supplied.] Section 2403 (17) of the Third Class City Law of June 23, 1931, P.L. 932, 53 P.S. § 12198—2403 (17) is sufficient authority for the placing of the parking meters on the sidewalks or curbs.

"If anything can be considered as settled under the decisions of our Pennsylvania courts, it is that municipalities, under the guise of a police regulation, cannot impose a revenue tax". Kittanning Borough v. American Nat. Gas Co., 239 Pa. 210, 211, 86 A. 717. The city of Easton could not lawfully rent parking space on its public streets as a revenue measure, but that is not what has been done here. The council has undertaken to correct a serious interruption of traffic occasioned by parking cars in a congested district for unreasonable periods and in double rows and at the same time to furnish reasonable accommodations for the public who may have occasion to stop, and then to impose the cost of such regulation on those who make necessary the machinery and labor employed in correcting the conditions. The findings of the court show that the plan when put in operation was a success. "It is not necessarily an infringement of the rights of individuals in public ways to charge a small fee for some legitimate special use to defray the cost of the special service afforded". In re Opinion of the Justices, supra. "It has been recognized consistently by judicial authority that, where it is necessary in the proper conduct of business that unusual demands be made on the city facilities, a reasonable charge may be made by the municipality to cover its actual expense in providing such special services. . . . In the broad sense every ordinance which requires the payment of money is a revenue producing measure, but the primary purpose of ordinances such as this under consideration is the reimbursement of the city for providing special services to the licensees. Though we may suppose the ordinance was imposed to increase the revenue, this does not invalidate it as a licensing ordinance if it clearly appears the city is seeking to compel the persons who cause expense to pay for it". American Baseball Club of Phila.

⁸ Greene County v. Center Twp., 305 Pa. 79, 86, 87, 157 A. 777; Tranter v. Allegheny Co. Authority, 316 Pa. 65, 74, 173 A. 289.

v. Philadelphia, supra, 312 Pa. at page 314, 167 A. at page 892, 92 A.L.R. 386.

We do not deem the charge imposed by this ordinance to be in conflict with § 723 of the Vehicle Code, 75 P.S. § 332.9 The legislature by this section intended to prevent the imposition of taxes by municipal subdivisions for the general operation of motor vehicles. The fee charged here is not primarily for the operation of the vehicles but only as an aid to the enforcement of the time limit on parking. We find no interference between the ordinance and the statute.

The appellants further argue that the actual receipts arising from this ordinance are so far in excess of its own budgetary estimates of expenses as to compel the inference that the ordinance is strictly a revenue measure and therefore unlawful. "It is incumbent on the party who alleges the invalidity of and ordinance upon the ground of unreasonableness to aver and prove the facts that make it so. Kittanning Borough v. [Kittanning Consol.] Nat. Gas Co., 26 Pa.Super. 355; Kittanning Borough v. [Armstrong] Water Co., 35 Pa.Super. 174". Kittanning Borough v. American Nat. Gas Co., supra, 239 Pa. at page 213, 86 A. at page 718. We agree with the court below that appellants failed to meet that burden. The receipts from the operations of the parking meters for the period between October 31, 1941, and April 13, 1942, were shown conclusively by stipulation. No stipulation was filed as to cost of operation and there is nothing in the record to show the actual expenditures during that period or any other date. Neither is there any evidence from which a reasonable estimate of the probable costs of the special service can be made. There was admitted in evidence a budgetary statement by the Director of Finance. This could not be construed even as an attempted estimate of expenses applicable here. However, it was shown by uncontradicted evidence that the budgetary statement was inaccurate as applied to the present controversy. For example, it charged the entire cost of installation of the meters in one year although they had a life of approximately five years. The police supervision as stated was shown not to reflect the true situation. No allowance was made for possible liability arising through negligence and, in any event, the measure of reasonableness of the charge is not the amount actually expended by the borough in a particular year, much less in part of a year. Chester City v. Western Union Tel. Co., 154 Pa. 464, 25 A. 1134; Taylor Borough v. Postal T. C. Co., 202 Pa. 583, 52 A. 128.

^{9 &}quot;No city, borough, incorporated town, township or county shall require or collect any registration or license fee or tax for any motor vehicle".

In matters of this character municipalities must be given reasonable latitude in fixing charges to cover anticipated expenses to be incurred. All doubt should be resolved in favor of the fairness of the charge. Kittanning Boro. v. American Nat. Gas Co., supra, 239 Pa. at page 215, 86 A. 717. At the same time the municipality must keep in mind at all times that it may not employ this device to raise general revenue under the guise of a police regulation. The appellants so far have failed to show that the municipality has done so.

We find no merit in assignments of error 26 to 29, inclusive. The gist of the complaints is the weight given to the conclusion of Professor Frank R. Hunt called as an expert. It is sufficient to say that the profit made in other cities was not shown to involve the same conditions as existed in Easton and was of no guide in determining the immediate question. Such expenditures are bound to vary with the size of the municipality, extent of traffic, congestion of a district and similar matters. None of the matters complained of in these assignments of error would have had any effect upon the result.

The decree entered in each of the four appeals is affirmed at the cost of the respective appellants.

The constitutionality of regulation of traffic by the device of parking meters has been upheld in all the states in which the question has been adjudicated by the highest courts. The earlier cases are collected in Notes 108 A.L.R. 1152 (1938) and 130 A.L.R. 316 (1941). A late case supporting the regulation is Hickey v. Riley, Mayor, 177 Or. 321, 162 P.2d 371 (1945). Rhodes, Inc., v. City of Raleigh, 217 N.C. 627, 9 S.E.2d 389 (1940): and City of Shreveport v. Brister, 194 La. 615, 194 So. 566 (1939), adverse rulings were based upon lack of statutory authority. There is to be classed with these cases an advisory opinion of the Supreme Court of Rhode Island, 62 R.I. 347, 5 A.2d 455 (1939), to the effect that the Police and Fire Bureau of Providence did not have statutory authority to establish a parking meter system. In an Iowa case a parking meter installation was declared illegal on the grounds that the city did not comply with statutory requirements governing expenditures and that there was no statutory authority for the city's pledge of meter revenues to payment of the purchase price. Brodkey v. Sioux City, 229 Iowa 1291, 291 N.W. 171 (1940), 296 N.W. 352 (1941). The Alabama Court, in City of Birmingham v. Hood-McPherson Realty Co., 233 Ala. 352, 172 So. 114 (1937), rested a decision that a parking meter ordinance was invalid upon three

grounds: (1) the system involved an unauthorized abandonment of the terms upon which an affected street was dedicated, (2) enforcement would deprive an owner of abutting property of property without due process of law and (3) the meter charges were, in substance, an unauthorized tax. Recently, that decision was overruled in a case which brings Alabama in line with the prevailing view. City of Decatur v. Robinson, 36 So.2d 673 (1948). In both North Carolina and Louisiana express statutory authority for parking meters now exists. Gen. Stat. of N.C. § 160-200, par. 31 (1943) (cities of over 20,000); La.Act 231 of 1940 (cities of over 12,500; an act of 1946 extended this authority to all municipalities.) See generally Marion A. Grimes, "The Legality of Parking Meter Ordinances and Permissible Use of Parking Meter Funds" 35 Calif.L.Rev. 235 (1947); Charles S. Rhyne and Charlie O. Murphy, Parking Meters-Legality-Model Ordinance Annotated (Nat. Inst. of Mun. Law Officers, 1947).

The effect of the employment of parking meters upon access to abutting property has not given the courts much difficulty. The police power has prevailed just as it does where parking, as distinguished from momentary stopping, is banned in the case of narrow or congested streets. In the Rhodes case, supra, Judge Seawell made the interesting observation that the regulation was not, generally speaking, aimed at parking, but, instead, was directed to "the occupation of the parking space by the same car for an unreasonable length of time, to the detriment of the rights of others."

There are indications that, as a traffic-control device the parking meter is an ephemeral mechanism, since, at most, it is but a useful means of regulating on-street parking. It is not evident that any system of regulation of on-street parking will meet the critical problem of traffic control in downtown urban areas. Two obvious general approaches, either or both of which may be made in a particular community are (1) provision for off-street parking and (2) resort to measures, such as diversion of through traffic and fostering of public transportation facilities, designed to reduce the volume of downtown traffic.

Lots or garages which afford off-street parking space may be established and operated either by private enterprise or by government. In many communities the matter is left entirely to private hands. Quite recently municipal authorities have been turning to zoning under the police power as a means of requiring private automobile parking space to be provided for residences, theaters, churches and various other structures. Section IX of the City of Phoenix, Arizona, Building Zone Ordinance, as amended to July, 1947, is illustrative.

Automobile Parking Space

- "A. 1. For the purpose of this section 144 square feet of floor or lot area with access to a public thoroughfare shall be deemed to be parking space for one vehicle.
 - 2. In any district other than a Residence district where such space is required, the area of such space shall be surfaced with gravel, blacktop or other suitable material.
 - 3. In any case where a lot in a Business A or less restricted district, used for automobile parking space under the terms of this ordinance, adjoins a Residence district there shall be a solid wall of wood or masonry not more than 5 nor less than 4 feet in height along the lot line of such lot which lot line forms the boundary of said Residence district, except that where such wall adjoins the front yard of the adjoining residence lot said wall shall be 3 feet 6 inches in height.
 - 4. Any lights used to illuminate said parking space shall be so arranged as to reflect the light away from adjoining lots in Residence districts.
 - 5. Area in a Residence district to a width of 3 lots or 200 feet, whichever is lesser, which area is contiguous to the side boundary line of a Business district may be used for automobile parking space required under the terms of this ordinance subject to the securing of a use permit therefor, and to the following conditions:
 - a. Such area shall be paved with blacktop or concrete.
 - b. There shall be a solid wall of wood or masonry not more than 5 nor less than 4 feet in height along the entire boundary line of such area except for necessary driveways and except that along such part of said boundary line as would bound the front yard otherwise required in the district in which such area is located the wall shall be 3 feet 6 inches in height. Said wall shall be maintained in a neat and orderly condition and if constructed of wood shall be painted a neutral color.
- "B. Automobile parking space shall be provided according to the following schedule and subject to the following conditions in any district in which any of the following uses shall hereafter be established, except that the area entitled Central Business District as shown on the Building Density Map, a part of this ordinance, shall not be subject to the provisions of this section regarding the provision of automobile parking space.

- Parking space for one vehicle for each family dwelling unit occupying any lot except that when the family dwelling unit shall consist of not more than one room in addition to a bathroom and kitchen, parking space for not less than three vehicles shall be provided for each five such family dwelling units; such space shall be provided on the lot on which such family dwelling unit is located. When not enclosed within a building, such space shall occupy the rear yard of the aforesaid lot.
- Parking space for one vehicle for each 5 seats or simi-2. lar accommodations in any theater, auditorium, or stadium; such space shall be provided at a point not farther than 1,300 feet distant in a direct line from the nearest part of said theater, auditorium, or stadium.
- Parking space for one vehicle for each 8 seats or pew 3. spaces in any church; if said church be located in a Residence A or Residence B zone, such parking space shall be located on the same lot with said church; if said church be located in any other zone such space shall be provided at any point not farther than 1,300 feet distant in a direct line from the nearest part of said church.
- Parking space for one vehicle for each 50 feet of floor area in any restaurant, night club, bar, or dance hall; such space shall be provided at a point not farther than 1,300 feet distant in a direct line from the nearest part of said restaurant, night club, bar, or dance hall.
- Parking space for one vehicle for each 3 guest rooms or suites of guest rooms or patient's rooms in a hotel or hospital; such space shall be provided at a point not farther than 1,300 feet distant in a direct line from the nearest part of such hotel or hospital.
- Parking space for one vehicle for each guest room or suite of guest rooms in a tourist court and parking space for one vehicle for each trailer space in a trailer camp; such space shall be provided on the lot on which such tourist court or trailer camp is located.
- Parking space for one vehicle for each 500 square feet of floor area exclusive of automobile parking space on the ground floor of any commercial building not otherwise specified herein, and an additional parking space for one vehicle for each 800 square feet of floor area exclusive of automobile parking space on the upper floor or floors of any commercial building not otherwise specified herein; such space shall be provided at a point not farther than 1,300 feet distant in

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a direct line from the nearest part of such commercial building. The term commercial building shall not be deemed to include industrial buildings or warehouses.

"C. Any use other than a residential use which is required to provide parking space under the terms of this section shall be credited, in determining the total space to be provided, with parking space for one car for each 20 feet of street frontage of the lot occupied by such use, provided that said street frontage is usable under the terms of the Phoenix traffic code for automobile parking."

The writer is not aware of any instance in which this type of zoning has been tested in a court of last resort. A limited off-street parking ordinance was involved in Town of Clinton v. Ross, 226 N.C. 682, 40 S.E.2d 593 (1946), but the court did not find it necessary to pass on its validity.

The question whether acquisition and operation of parking lots or garages is a municipal or county public purpose should present little difficulty. The Court of Appeals of Kentucky recently upheld municipal condemnation of land for the purpose. Miller v. City of Georgetown, 301 Ky. 241, 191 S.W.2d 403 (1945). In 1936 the Supreme Court of Ohio held that Cleveland could not use parking space under a municipal auditorium as a commercial parking garage in competition with private business. City of Cleveland v. Ruple, 130 Ohio St. 465, 200 N.E. 507 (1936). The problem is so much more aggravated today that were the question to be clearly put to the same court at this time it would probably be determined that municipal parking facilities served a public purpose.

Off-street parking facilities have been provided by a much higher percentage of small cities than of large ones. Municipal Year Book 1948, 455. The Year Book records that of 302 cities over 10,000 which have parking lots nearly two-thirds are in the 10,000 to 25,000 population group. Competition for retail trade was offered by the 1946 Year Book as a principal reason for this marked difference. Perhaps suburban competition will stimulate large cities to remove the parking advantage by providing downtown parking areas. For further data and references to enabling legislation see James C. Yokum and Joan P. Whipple, Municipal Provision of Parking Facilities—State Laws and City Projects (Bureau of Business Research, The Ohio State University, Research Monograph No. 44, 1946).

A public parking facility may, assuming that there is appropriate enabling legislation, be financed by using available unappropriated funds, by general obligation borrowing, by special assessments, or by revenue bonds. The special assessment

method has been upheld in California with respect to a parking facility serving a business district. City of Whittier v. Dixon, 24 Cal.2d 664, 151 P.2d 5 (1944). Where revenue bond financing is contemplated it may be desired that a local parking authority be organized to administer the project. Concerning the possibility of pledging parking meter revenues to the payment of bonds issued to finance parking facilities see Marion A. Grimes, "The Legality of Parking Meter Ordinances and Permissible Use of Parking Meter Funds" 35 Calif.L.Rev. 235, 250 (1947).

The proposed construction of a municipal parking facility under a public street or square may raise questions, among others, as to consistency with the terms of a dedication and as to whether, if the public right is only an easement, the new use adds an extra burden upon the fee for which compensation must be made. These two questions may amount to substantially the same thing—an inquiry into whether the proposed use is embraced within, or at least not at variance with, the acknowledged public use to which the land has been put. In Massachusetts the view was taken that the construction of a subway under Boston Common was not inconsistent with the assumed purpose of the original dedication. ("common use of the inhabitants of Boston as a training field and cow pasture"!). Codman v. Cocker, 203 Mass. 146, 89 N.E. 177 (1909); Prince v. Crocker, 166 Mass. 347, 44 N.E. 446 (1896). The New York Court of Appeals, on the other hand, concluded that construction and operation of a municipal subway was a non-street use which imposed an extra burden for which the owner of the fee was entitled to compensation. In re Board of Rapid Transit Railroad Commissioners of New York, 197 N.Y. 81, 90 N.E. 456 (1910).10

LOWELL v. CITY OF BOSTON

Supreme Judicial Court of Massachusetts, 1948. 322 Mass. 709, 79 N.E.2d 713.

RONAN, JUSTICE. Lowell and more than ten taxpayers of the city of Boston brought a petition under G.L.(Ter.Ed.) c. 40, § 53, against the city, its mayor and board of park commissioners, and the Motor Park, Inc., a private corporation, to restrain the respondent municipal officials from imposing unauthorized financial obligations upon the city which, it is alleged, will result from entering into a contract with that private corporation, by the

¹⁰ The question of lateral support as between the owner of abutting property and a local unit may also arise. See III Dillon, Mun.Corps. § 1153 (5th ed. 1911); Evelyn Bldg. Corporation v. City of New York, 257 N.Y. 501, 178 N.E. 771 (1931); In re Board of Rapid Transit Railroad Commissioners of City of New York, supra.

park commissioners with the approval of the mayor, as provided in St.1946, c. 294. The object of the contract will be to construct and operate an underground garage for the parking of automobiles under the Boston Common, with a vehicular tunnel from Commonwealth avenue under the Public Garden to the garage and an underground passage for patrons and employees from the garage to Tremont Street near West Street. The petition prays for an injunction against leasing the site of the proposed garage to the private corporation, as those officers intend to do. It is also alleged that this proposed use of the Common would be contrary to the terms of certain testamentary gifts which the city has accepted. The city in its answer sought a declaratory decree that St.1946, c. 294, was valid and that it held an unencumbered title to the Common and Public Garden.

The second petition was brought against the city alone by leave of court by Pierce and not less than ten other taxpayers of the city, alleging that the city holds Boston Common "and its accessory the Public Garden" by a gift made in 1634 to the town for the use primarily by its inhabitants as a Common, and that the city holds the title in a trust relation to those for whose use the land as a Common was provided; and praying that the gift and trust be determined, the purposes of the gift be enforced, and any use of the land inconsistent with the gift be restrained. The petition as amended alleges that the city accepted a gift under the will of George Francis Parkman, the income of which was to be used for the maintenance and improvement of the Common and parks of the city, and that the city intends to divert the use of the Common to another use which would constitute a violation of its acceptance of the Parkman gift. In this suit the city sought a declaratory decree under G.L. (Ter. Ed.) c. 231A, as inserted by St.1945, c. 582, § 1, that St.1946, c. 294, is a valid enactment; that the city is empowered to act under the provisions of said statute; and that the use of Boston Common and the Public Garden by the city is subject only to such restrictions as may be imposed by the Legislature which represents the interest of the general public in the use of said land.

The third petition was brought by McCarthy and others against the city by leave of court under G.L. (Ter.Ed.) c. 214, § 3(11), to enforce the terms of the George Francis Parkman gift which was given to and accepted by the city. The city denies that the execution of a lease to a private corporation in accordance with St.1946, c. 294, will impair the obligations imposed on the city by its acceptance of the Parkman gift.

These three petitions were heard together upon oral testimony which related chiefly to the construction and operation of the proposed garage and the manner and extent in which it might affect the Common. The principal evidence, however, which pertained to the origin, history and use of the Common consisted of documentary evidence comprising public records, ancient maps, plans, photographs, various written instruments and historical books. The judge made findings of fact and reported the cases to this court on the pleadings, the evidence, his rulings on evidence and exceptions thereto, and his findings of fact, such decrees to be entered as justice and equity may require. Questions of evidence have not been argued.

The present Common is bounded by Charles Street one thousand three hundred sixty feet, Beacon Street one thousand seven hundred sixty feet, Park Street four hundred eighty feet, Tremont Street one thousand six hundred eighty feet, and Boylston Street seven hundred sixty feet. Forty-four acres of the original location were acquired from William Blackstone in 1634. A parcel of two and one eighth acres located at what is now the corner of Tremont Street and Boylston Street, known as the Deer Park, which was acquired by the town in 1787, and the parcel adjoining on the west and abutting on what is now Boylston Street, which was purchased by the town in 1756 and used for a burial ground, consisting of one and four tenths acres, were added to the Blackstone land.

The parties are at issue as to the nature of the title to the Common which vested in the town in 1634. The Lowell petition alleged that the town acquired the title to the Common in 1634 from the early inhabitants, who by individual contributions paid William Blackstone for a conveyance of the land, and that the town accepted the title subject to laving out the land as a training field and administering it for the common good of all the inhabitants forever. The Pierce petition alleged that the Common was given to the town in 1634, that the city as successor to the town holds the Common and the Public Garden for the use of its inhabitants and the public as a Common, and that it now holds the title in a trust relation to the people for whose use as a Common the property was provided. The McCarthy petition alleged that the town held from the time immemorial only a bare technical title to the land of the Boston Common without any of the incidents of ownership but in trust only for the specific uses and purposes for which it was dedicated. To these allegations the city answered that the town acquired title to the Common in 1634 by purchase from William Blackstone for thirty pounds. which was not obtained from individual contributions of the inhabitants but was raised by taxation, and that the town by the terms of the purchase acquired the land in fee simple subject to no conditions of any kind.

[Here the court reviewed at some length the exhaustive history of the Common set out in the record and concluded that the town bought the Blackstone land and took title in fee without restrictions. The court answered the question whether the Common was taken by the town subject to a trust in the negative and distinguished the Crocker cases, cited supra, on the ground that under the pleadings in those cases it was assumed, without decision, that the Common had been taken subject to a trust.]

While we are of the opinion that title to the Common vested in fee simple in the town free from any trust, we do not agree with the respondents that the city now possesses title free from any restriction, for it is plain that the town has dedicated the Common and the Public Garden to the use of the public as a public park. A municipality may dedicate land owned by it to a particular public purpose provided there is nothing in the terms and conditions by which it was acquired or the purposes for which it is held preventing it from doing so, Attorney General v. Tarr, 148 Mass. 309, 19 N.E. 358, 2 L.R.A. 87; Tiffany, Real Property (3d Ed.) § 1100, and upon completion of the dedication it becomes irrevocable. Hayden v. Stone, 112 Mass. 346, 350; Longley v. Worcester, 304 Mass. 580, 588, 24 N.E.2d 533. The general public for whose benefit a use in the land was established by an owner obtains an interest in the land in the nature of an easement. Wright v. Tukey, 3 Cush. 290; Attorney General v. Abbott, 154 Mass. 323, 28 N.E. 346, 13 L.R.A. 251; Attorney General v. Vineyard Grove Co., 181 Mass. 507, 64 N.E. 75; Attorney General v. Onset Bay Grove Association, 221 Mass. 342. 109 N.E. 165. The rights of the public in such an easement are subject to the paramount authority of the Legislature which may limit, suspend or terminate the easement. It was stated in Wright v. Walcott, 238 Mass. 432, 435, 131 N.E. 291, 292, 18 A.L.R. 1242, that "Land acquired by a city or town by eminent domain or through expenditure of public funds, held strictly for public uses as a park and not subject to the terms of any gift, devise, grant, bequest or other trust or condition, is under the control of the General Court. It may be transferred to some other agency of government or devoted to some other public use by legislative mandate. The power of the General Court in this regard is supreme over that of the city or town. When title in fee is acquired in the land by the municipality for such a public use, there is no right of reversion to the original owner. He has been diverted of every vestige of title when he parted with the fee." Although, as already pointed out, the decision in Codman v. Crocker, 203 Mass. 146, 89 N.E. 177, 25 L.R.A., N.S., 980, was based upon the assumption that the Common was dedicated by

its owners as a training field and a cow pasture, it was said at page 153 of 203 Mass., at page 180 of 89 N.E. "that the title of the city is held only in its municipal capacity as an agency of the government for the benefit of the public, and that the power of the Legislature to represent this interest is supreme." See also Wrentham v. Norfolk, 114 Mass. 555; Agawam v. Hampden County, 130 Mass. 528; Higginson v. Treasurer & School House Commissioners of Boston, 212 Mass. 583, 99 N.E. 523, 42 L.R.A., N.S., 215.

The city holds the title to the Common and the Public Garden in a corporate capacity as an agency of government as distinguished from a private or proprietary capacity. It has long been settled that parks and commons are held and maintained by municipalities not as private owners for their own particular uses but for the benefit of all members of the public who might have occasion to resort to them. Oliver v. Worcester, 102 Mass. 489, 3 Am.Rep. 485; Wrentham v. Norfolk, 114 Mass. 555; Holt v. Somerville, 127 Mass. 408; Clark v. Waltham, 128 Mass. 567; Attorney General v. Abbott, 154 Mass. 323, 28 N.E. 346, 13 L.R.A. 251; Commonwealth v. Abrahams, 156 Mass. 57, 30 N.E. 79; Higginson v. Treasurer & School House Commissioners of Boston, 212 Mass. 583, 99 N.E. 523, 42 L.R.A., N.S., 215. The instant cases are readily distinguishable from those where the city possesses property in a proprietary capacity and where its ownership must be recognized by the Legislature and the rights of the municipality in such property protected from impairment or loss except by the exercise of eminent domain and the payment of fair compensation. Mount Hope Cemetery v. Boston, 158 Mass. 509, 33 N.E. 695, 35 Am.St.Rep. 515; Ware v. Fitchburg, 200 Mass. 61, 85 N.E. 951.

The Blackstone land at the time it was acquired by the town had not been put to any permanent use. It had only recently been released by the Colony to Blackstone. It was uncertain during the first years of the town's ownership whether the land should be divided or held as a Common. It was not until 1640, after attempts of the inhabitants to have the land divided among them had failed, that it was definitely decided that the land should be kept open as a Common and the town dedicated the land to the public, and the city continued to develop the Common as a park after the town in 1822 accepted St.1821, c. 110, and became a city. The city also set up the Public Garden as a public park after it again acquired the title to it in 1824. The city now by the dedication of the Common and the Public Garden to the public as a public park holds these parcels of land for the benefit of those for whom the parcels have been set apart. That the city holds the title for the public benefit has been frequently referred to in

our decisions. Steele v. Boston, 128 Mass. 583; Veale v. Boston, 135 Mass. 187, 188; Lincoln v. Boston, 148 Mass. 578, 580, 20 N.E. 329, 3 L.R.A. 257, 12 Am.St.Rep. 601; Commonwealth v. Davis, 162 Mass. 510, 511, 39 N.E. 113, 26 L.R.A. 712, 44 Am.St.Rep. 389.

We now pass to a consideration of St.1946, c. 294, which purports on its face to authorize the construction of an underground garage in the Common. Section 1 of c. 294 sets forth that the congestion of the public ways of Boston caused by the great number of motor vehicles has become a public nuisance which cannot be abated except by the construction and maintenance of a garage under the Common. Section 2 authorizes the city, acting through its park department with the approval of the mayor, to contract with a private corporation for the construction and operation of a garage, at the expense of the corporation and without cost to the city, to be located in the southwesterly portion of the Common, with necessary approaches above and below ground from Charles Street and also an entrance by means of a tunnel from Commonwealth Avenue and running under the Public Garden. the garage to be set back certain distances from Charles and Beacon streets; the city is empowered to lease the site for a term of not more than forty years at a rental of not less than two per cent of the gross receipts; the construction is to be completed within three years, and the gardens, lawns, trees and shrubs in the area of the work are to be restored to substantially the same condition in which they were prior to the construction, with the exception of the places of ingress and egress, and construction to be carried on so that the filling or relocation of the Public Garden Pond will not be required.

The park department of the city with the approval of the mayor intends to secure the construction of the garage and has been negotiating with the respondent Motor Park, Inc., for the purpose of agreeing upon the plans and the provisions of the lease. Tentative plans have been prepared and alterations have been suggested by the park department. These plans furnish a rough outline of the proposed structure. The tentative plans are for a three-story structure of reinforced concrete beneath about thirteen acres of the Common accommodating about three thousand five hundred passenger automobiles. Gasoline, oil, tires, and other accessories usually to be had in a garage will be sold. The front of the building will set back one hundred thirtyfive feet from Charles Street. A tunnel commencing on Commonwealth Avenue between Berkeley and Arlington streets will run under the Public Garden and Charles Street to the second floor of the garage. Besides, there will be two vehicular entrances about twenty feet wide from Charles Street, sloping down

to the top floor of the garage. There will be a tunnel for customers and employees running from the easterly end of the garage to Tremont Street at about opposite West Street. There may be other tunnels required for the use of persons in case of fire when the plans are completed and approved by the proper authorities. The roof of the garage will be about four or six feet below the present surface of the Common. It is contemplated to have a ventilating exhaust which will extend about fifteen feet above the ground and be located in and above the men's room at about where a similar structure now stands in the present ball field on the Common. Although the present plans for the garage are merely preliminary sketches, it is not to be assumed that it will be located, constructed and operated without reasonable regard to the use of the public in the Common and the Public Garden. Boston v. Brookline, 156 Mass. 172, 176, 30 N.E. 611.

We are not at all certain that the Lowell petition can be maintained as a taxpayers' petition under G.L. (Ter.Ed.) c. 40, § 53, to restrain the city from raising or expending money or from incurring obligations for any purpose for which it has no right to use public funds or to assume obligations. These petitioners urge that the receipt of revenue by the city will result in depriving the city of the defense which it now has in actions brought by persons injured by reason of a defective condition of the Common or the Public Garden. We need not decide whether this result would follow because, if it would, the deprivation of this defence would not be the incurring of an obligation within the terms of the statute. Kelley v. Board of Health of Peabody. 248 Mass. 165, 143 N.E. 39; Dealtry v. Selectmen of Town of Watertown, 279 Mass. 22, 180 N.E. 621. The construction of the garage will require the relocation of the water mains. judge found that the performance of this work will cost \$100,-000 or more. There is nothing in this contention because the statute, St.1946, c. 294, § 2, provides for the construction and operation of the garage "at the expense of the corporation and without cost to the city." An official of the Motor Park, Inc., testified that the relocation of these water pipes was an item of expense to be borne by this corporation. It is to be assumed that the parties in this respect will act in good faith strictly in compliance with the express provisions of the statute. Duffy v. Treasurer & Receiver General, 234 Mass. 42, 50, 125 N.E. 135. The city has not incurred any expense and it is not made to appear that it will with reference to the proposed garage. It is suggested that the garage would not be subject to taxation. would not result in the city losing any taxes where none now are assessable. Burr v. Boston, 208 Mass. 537, 95 N.E. 208.

34 L.R.A., N.S., 143. In any event, the taxation of the garage is a matter for the Legislature, and the occupant of commercial property located on land owned by the Commonwealth or held by the city in trust may be made liable for the tax. Boston Fish Market Corp. v. Boston, 224 Mass. 31, 112 N.E. 616; Stoneman v. Boston, 263 Mass. 255, 160 N.E. 788; Irving Usen Co. Inc. v. Board of Assessors of Boston, 309 Mass. 544, 36 N.E.2d 373. These petitioners finally contend that the lease will impose certain obligations on the city. No particular provisions of the contemplated lease have been brought to our attention. It is assumed that it will contain a covenant for quiet enjoyment. Contracts are made to be kept, and as a practical matter it is not shown by this record that the city is likely to be dispossessed of the locus or that it is probable that it would wrongfully eject the lessee. Moreover, the execution of a lease is sanctioned by the Legislature, and the giving of the lease can hardly be said to amount to the incurring of an unauthorized obligation unless the statute is invalid. All these matters, reaching as they do to the essentials required for the maintenance of a taxpayers' petition under the statute, G.L. (Ter.Ed.) c. 40, § 53, would require serious consideration if this petition were held to be otherwise maintain-Browne v. Turner, 176 Mass. 9, 56 N.E. 969: Commonwealth v. McNary, 246 Mass. 46, 140 N.E. 255, 29 A.L.R. 483.

Still confining our discussion to the Lowell petition, we pass to a consideration of the validity of St.1946, c. 294. The legislative declaration as to the public conditions which led up to the enactment of the statute and the purpose sought to be accomplished are entitled to great weight. Lajoie v. Milliken, 242 Mass. 508. 521, 136 N.E. 419; Allydonn Realty Corp. v. Holyoke Housing Authority, 304 Mass. 288, 293, 294, 23 N.E.2d 665; Block v. Hirsh, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, 16 A.L.R. 165; Woods v. Cloyd W. Miller Co., 333 U.S. 138, 68 S.Ct. 421. The necessity for a statute is for the Legislature to determine and so is the selection of the means to be employed for the accomplishment of the public purpose for which the statute was enacted in the absence of any impairment of private rights. We are not concerned with the alleged need or the proposed means, whatever our personal opinions might be as to the wisdom of the legislative judgment. The only question for us is whether it was within the competency of the Legislature to pass the statute. Slome v. Chief of Police of Fitchburg, 304 Mass. 187, 23 N.E.2d 133; Attorney General v. Secretary of the Commonwealth, 306 Mass. 25, 27 N. E.2d 265; Commonwealth v. Hudson, 315 Mass. 335, 52 N.E.2d 566: Robinson's Case, 320 Mass. 698, 71 N.E.2d 237. The title to the Common and the Public Garden is in the city; the beneficial use is in the public. The town did not take the land under any

trust, although it has dedicated it to a public use and now holds it for such use, and the Legislature represents those entitled to the use and enjoyment of both parcels of land. It is settled that the ownership in and the management by the city of a public park, which was acquired free of any trust, conditions, or restrictions, is subject to the paramount control of the Legislature. Higginson v. Treasurer & School House Commissioners of Boston, 212 Mass. 583, 584, 99 N.E. 523, 42 L.R.A.,N.S., 215; Wright v. Walcott, 238 Mass. 432, 435, 131 N.E. 291, 18 A.L.R. 1242.

The Legislature could authorize the city to lease the site of the garage to a private corporation for not more than the maximum term or not less than the minimum rental designated by the statute. This legislation did not go so far as the statute in Browne v. Turner, 176 Mass. 9, 56 N.E. 969, where the city through a board was directed to construct a subway at its own expense and lease it to a particular railway company; or the act in Prince v. Crocker, 166 Mass. 347, 44 N.E. 446, 32 L.R.A. 610, where the city upon the acceptance of the statute was directed to construct the Boylston and Tremont streets subway without the payment of compensation; or the enactment in Codman v. Crocker, 203 Mass. 146, 89 N.E. 177, 25 L.R.A., N.S., 980, where the city was ordered without any acceptance of the statute and without compensation to construct the Cambridge and Boston subway and to lease it to the Boston Elevated Railway Company. In the instant case, by the terms of the statute, it was optional with the city, acting through its park department with the approval of the mayor, to enter into a contract with some private corporation for the construction and operation by the latter of a garage. In maintaining the Common and the Public Garden the city was merely acting as representative of the general public, which in turn was represented by the Legislature, and if the latter determined that it would be to the advantage of the general public to eliminate the congestion of traffic, even if this necessitated the withdrawal from public use, of 4 comparatively small areas of the surface of the Common for entrances to and exits from the garage it had power to make the choice or to leave the answer, as it did here, to the city. Stone v. Charlestown, 114 Mass. 214: Howes Brothers Co. v. Massachusetts Unemployment Compensation Commission, 296 Mass. 275, 288, 5 N.E.2d 720. If the city executed a lease, the garage would during the term of the lease be in the exclusive possession of the corporate lessee for the conduct of a purely commercial venture for its own profit. The objection that the Legislature was without power to permit the city to enter into such a transaction would undoubtedly call for serious consideration if the sole purpose of the act were the construction and operation of the garage and nothing more. We

would then have to decide whether the maintenance of the garage stood in such a relation to the public interest that land could be taken by the city and leased for its maintenance or for the parking of automobiles as seemed to have been assumed in St.1946, c. 474, and decided in Whittier v. Dixon, 24 Cal.2d 664, 151 P.2d 5, 153 A.L.R. 956. The objection rests upon a mistaken view of the statute. The garage is an incident in a legislative plan designed to abate a public nuisance arising from serious traffic congestion due to the greatly increased use of motor vehicles and their parking in the public ways of the city. The garage is a method employed to accomplish the primary purpose of the statute. Statutes reasonably designed to eliminate a public nuisance have been sustained, although some particular benefit to private individuals has resulted. Talbot v. Hudson, 16 Gray, 417; Moore v. Sanford, 151 Mass. 285, 24 N.E. 323, 7 L.R.A. 151; N. Ward Co. v. Street Commissioners of Boston, 217 Mass. 381, 104 N.E. 965. The object sought to be reached by the statute, it is said, could not be realized by the action of private individuals, for the statute indicates that the nuisance could not be abated "except by construction and maintenance of a garage under Boston Common." The applicable principle governing the validity of St.1946, c. 294, is somewhat similar to that sustaining housing authority statutes primarily enacted for the abatement of nuisances by the elimination of slum districts, although incidently conferring a personal benefit on those earning low incomes who would become occupants of the new structures. Allydonn Realty Corp. v. Holyoke Housing Authority, 304 Mass. 288, 296, 297, 23 N.E.2d 665, and cases cited. It was held in City and County of San Francisco v. Linares, 16 Cal.2d 441, 106 P.2d 369, that the city could construct a large garage under a public square, where the surface of the square would not be permanently interfered with except by the entrances to the garage, and lease the garage for the term of fifty years. See also Oakland v. Williams, 206 Cal. 315, 274 P. 328; Marchant v. Baltimore, 146 Md. 513, 126 A. 884; Central Land Co. v. Grand Rapids, 302 Mich. 105, 4 N.W.2d 485; In re Mayor of New York, 135 N.Y. 253, 31 N.E. 1043, 31 Am.St.Rep. 825. We are of opinion that St.1946, c. 294, was within the power of the Legislature to enact for the purpose of eliminating a public nuisance even though it will result in withdrawing from the use of the public a small part of the surface of the Common.

The Pierce petition seeks the enforcement of trusts created for the benefit of Boston Common. The McCarthy petition seeks the enforcement of the Parkman gift. George Francis Parkman devised all the residue of his estate to the city of Boston for the purchase and improvement of land for a public park, the land to be located near a thickly inhabited section of the city. He pointed out a parcel of land which he considered would be desirable for the purpose, although "The indication of the above is intended as a suggestion and not a specific direction for the location of the Park": and if the city at the time of his death had acquired land for a park situated as near as possible to the site he had suggested so that the purchase of the site mentioned would be unnecessary, "then the said bequest is to be applied by the city to form a fund the income of which is to be used for the maintenance and improvement of the Park already created as above and of the Boston Common. . . . This bequest is made to the City of Boston in the hope and expectation that the Boston Common shall never either in whole or in part be diverted from the present use as a Public Park for the benefit and enjoyment of its citizens." He provided by a codicil that the clause of his will devising the residue of his estate to the city "is modified as follows, and anything therein contained inconsistent with this codicil is hereby revoked. I devise said residue to the City of Boston to constitute a fund, the income of which is to be applied to the maintenance and improvement of the Common and the Parks now existing and is not to be used for the purchase of additional land for park purposes. Any portion of said income which may not be required for the above purpose in any year is to be added to and invested as a part of said fund."

The testator desired at the time he executed his will that the city should purchase land for a park in the locality mentioned by him, and that the income of the trust should be used for the maintenance and improvement of this park and the Common. At the time he executed the codicil he desired that the income of the residue be applied to the maintenance and improvement of existing parks and the Common but not for the purchase of any additional land for parks. The general rule is that will and codicil are to be read together and that the provisions of the will are to be construed as altered or affected by the terms of the codicil only to the extent that the terms of the latter are inconsistent with the provisions of the former, in the absence of a manifestation of a contrary intent of the testator. Gray v. Sherman, 5 Allen 198; Lovering v. Balch, 210 Mass. 105, 96 N.E. 142; Gilmore v. Doherty, 317 Mass. 188, 57 N.E.2d 564, 156 A.L.R. 788; Grozier v. Billington, 318 Mass. 416, 61 N.E.2d 828. The testator provided that the portion of the will inconsistent with the codicil should be revoked. The case comes within this general rule. The codicil substituted a new plan for that mentioned in the will in so far as the codicil differed from the will as to the particular parcels of lands which were to be maintained and improved. The benefaction for the Common itself expressed in the codicil was

attended with the same incidents and qualities as those expressed in the will. Tilden v. Tilden, 13 Gray 103; Snow v. Foley, 119 Mass. 102; O'Brien v. Lewis, 208 Mass. 515, 94 N.E. 750. The testator remained constant in his purpose to make a disposition of his property for the benefit of the Common, and his expression in the will that he was making a provision for the Common "in the hope and expectation" that the Common should not be diverted in whole or in part from its present use must be considered in construing the codicil. The question presented is the effect and force which must be given to the words just quoted. quoted words are ordinarily of a precatory nature, but the setting in which they are employed has sometimes given them a mandatory character imposing an imperative duty upon those to whom they are addressed. The inquiry usually is whether such words sufficiently manifest an intention to create a trust. Warner v. Bates, 98 Mass. 274; Aldrich v. Aldrich, 172 Mass. 101, 51 N.E. 449; Poor v. Bradbury, 196 Mass. 207, 81 N.E. 882; Blunt v. Taylor, 230 Mass. 303, 119 N.E. 954; Temple v. Russell, 251 Mass. 231, 146 N.E. 679, 49 A.L.R. 1. We are not here concerned with that inquiry because a trust was in fact created. The question presented is whether these words are an inherent and essential part of the trust or amount to no more than the expression of a wish or suggestion, compliance with which was intended by the testator to be discretionary with, rather than obligatory upon, the trustees. The will and codicil show that the testator knew how to express in apt and accurate language a command, limitation or condition as distinguished from a wish, hope or expectation. We are of the opinion that the testator used the words "hope and expectation" in the ordinary sense as expressing a desire and a wish and not as imposing a limitation or condition which constituted an integral and essential part of the trust. The withdrawal of comparatively small areas of the surface of the Common from public use as contemplated for the operation of the proposed garage can hardly be said to result in a material interference with the public uses. See Codman v. Crocker, 203 Mass. 146, 151, 89 N.E. 177, 25 L.R.A., N.S., 980. We are of opinion that the proposed use of these areas will not constitute a breach of any mandatory and essential provision as distinguished from any directory and precatory provision contained in the Parkman trust. Drury v. Natick, 10 Allen 169, 183: Dickson v. United States, 125 Mass. 311, 28 Am.Rep. 230; Davis v. Barnstable, 154 Mass. 224, 226, 28 N.E. 165; Ware v. Fitchburg, 200 Mass. 61, 67, 85 N.E. 951; In re Estate of Secrest, 109 Neb. 431, 191 N.W. 663; Manners v. Philadelphia Library Co., 93 Pa. 165, 173, 39 Am.Rep. 741; Petition of Ogden, 25 R.I. 373, 55 A. 933; Newport Hospital v. Harvey, 49 R.I. 40, 139 A. 659.

The city in its answer to the Lowell and Pierce petitions set up a counterclaim seeking a declaratory decree under G.L. (Ter.Ed.) c. 231A, inserted by St.1945, c. 582, § 1, that it owned the premises in question in absolute fee free from any trusts or restrictions whatever and that St.1946, c. 294, was valid. We deal with this matter, as did the parties, in connection with the Pierce petition. An adjudication of the title is an appropriate subject for a declaratory decree, and the city is entitled to a decree adjudging that it holds the premises for the purpose of a public park. It is doubtful whether the city is entitled to an adjudication that St.1946, c. 294, is valid by reason of its failure to give notice to the Attorney General in accordance with c. 231A, § 8, as added by St.1945, c. 582. See Borchard, Declaratory Judgments (2d Ed.) 275. We have decided that the statute is valid; and as a formal adjudication to that effect would not confer any benefit or advantage upon the city in addition to that enuring to it by virtue of this opinion, we see no necessity of including it in a declaratory decree. G.L.(Ter.Ed.) c. 231A, § 3, as added by St. 1945, c. 582.

Decrees are to be entered dismissing all petitions including the counterclaim in the Lowell case, and a decree is to be entered on the counterclaim to the Pierce petition that the city has title to the Common and the Public Garden subject to an easement in favor of the general public for the purposes of a public park. G.L.(Ter.Ed.) c. 231A, §§ 3, 8, as added by St.1945, c. 582, § 1.

So ordered.11

"Freeways" or "limited access highways" have come, in recent years, to be favored as means of preserving the safety, traffic capacity and attractiveness of highways, express highways in particular. See R. R. Bowie, "Limiting Highway Access" 4 Md.L. Rev. 219 (1940). Commercial exploitation of highway traffic by the unsightly (and this is a gross euphemism) Coney-Island type of roadside development is but one of the problems. The Pennsylvania Turnpike epitomizes the "freeway" as a means of effecting both safe and full use of a high-speed highway. In urban areas the same objectives exist with respect to express highways, which traverse or skirt cities, and to arterial streets, which tap suburbs and connect different sections of a metropolitan community.

The establishment of a freeway entails, in short, the public acquisition by purchase or condemnation of access rights, as appropriate to enable public authority to limit or completely exclude

¹¹ Footnotes omitted.

the right of vehicular access. Express statutory authority is necessary for this unconventional attack on access rights.

The following excerpt from a chapter on "The Post War Highway Program", prepared by Thomas H. McDonald, Commissioner of Public Roads, Public Roads Administration, Federal Works Agency, which appears in The Book of the States 1945–46 (at 299, 303) is pertinent:

Control of access is a first essential in the creation of express routes such as are being planned for the national system of interstate highways. There are seventeen states that now have laws permitting the control of access to express highways from adjoining lands and property. It is important that similar legislation be enacted in the thirty-one states that still lack comprehensive legal sanctions. Provision should be made for the broadest and most effective application of this principle, which is now endorsed by the expert and layman alike. A model law to achieve this objective has been offered for consideration by state legislatures.

Concerning parkways see Spicer v. City of Goldsboro, 226 N.C. 557, 39 S.E.2d 526 (1946), citing other cases.

The problems of street control are so varied that but limited additional illustrations may be offered here.

1. There is the matter of regulating the use of a street as "a market place of ideas" in order to prevent disorder, littering of a street and obstruction to traffic. It is assumed that the student is familiar with the course of judicial interpretation which has brought within the reach of the due process clause of the Fourteenth Amendment impairment of certain civil liberties including freedom of religion, freedom of speech and the press and the right of assembly. Some of the high points in recent Supreme Court adjudication are noted in the following paragraphs.

As applied to the dissemination of religious literature in the form of handbills, tracts or books and whether free or for a price, a flat prohibition by ordinance or a requirement that one obtain a license or permit, which is in the discretion of a local officer, will not stand up. In Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666 (1938), such an ordinance was declared to be censorship in its baldest form. It would not help to place the discretion in the hands of the municipal governing body or even to establish some broad standard designed to govern its exercise.

While the same protection would extend to the dissemination of nonreligious ideas or information, strictly commercial matter is on a different footing. A prohibition against distribution of commercial and business advertising matter on the streets had been upheld. Valentine v. Chrestensen, 316 U.S. 52, 62 S.Ct. 920

(1942). Nor will it avail to attempt to disguise commercial handbills by including, as was done in that case, some expression of opinion on a civic matter. This decision is doubtless broad enough to sustain prohibition of street solicitation by book agents whose object is sale of books as merchandise and not the dissemination of ideas or information.

A distinction has been made, moreover, with respect to minors selling religious literature on streets or other public places. A Massachusetts statute forbade such selling by boys under 12 and girls under 18 and made it unlawful for any parent or guardian to permit a child to work in violation of the law. A Jehovah's Witness violated the act by having her nine year old ward undertake to sell their literature on the streets of Brockton. A conviction of the Witness, under the penal provisions of the act, was sustained by the Supreme Court on the theory that the power of the state to interpose for the protection of children embraced greater control of their conduct than was the case as to adults. It was conceded that such a prohibition would have been invalid as applied to adults. Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438 (1944).

Freedom of speech does not carry to the point of immunizing one who uses provocative language to another in a public place. A member of Jehovah's Witnesses who had been distributing the literature of the sect on the streets of a New Hampshire municipality, until a disturbance occurred due to the annoyance of some of the citizenry, called the city marshal a "damned racketeer" and a "damned Fascist". He was prosecuted under a statute which forbade anyone to address offensive, derisive or annoying words to any person who was lawfully in a public place. The statute was upheld against a charge that it denied freedom of speech. It was within the range of state power to prevent breaches of the peace. Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766 (1942).

In 1946 the Court carried its protection of civil liberties an important step further. A Jehovah's Witness was convicted in an Alabama court of violating a state law, which made it a crime to enter or remain on the premises of another after having been warned to stay or get off. The case was one where she had insisted upon distributing her literature on a street of an unincorporated company town after being ordered not to do so. The street had not been irrevocably dedicated but was actually in open public use. The Supreme Court held the statute invalid as applied to that case, despite the proprietary position of the corporation. In other words, private property gave way before what was considered a superior interest, the interest of the people of the community in the free dissemination of intelligence and ideas.

Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276 (1946). A like result was reached in a case of Texas origin, where the unincorporated community was a federal defense housing village. Tucker v. Texas, 326 U.S. 517, 66 S.Ct. 274 (1946).

SAIA v. PEOPLE OF STATE OF NEW YORK

Supreme Court of the United States, 1948. 334 U.S. 558, 68 S.Ct. 1148.

Mr. Justice Douglas delivered the opinion of the Court.

This case presents the question of the validity under the Fourteenth Amendment of a penal ordinance of the City of Lockport, New York, which forbids the use of sound amplification devices except with permission of the Chief of Police.¹²

Appellant is a minister of the religious sect known as Jehovah's Witnesses. He obtained from the Chief of Police permission to use sound equipment, mounted atop his car, to amplify lectures on religious subjects. The lectures were given at a fixed place in a public park on designated Sundays. When this permit expired, he applied for another one but was refused on the ground that complaints had been made. Appellant nevertheless used his equipment as planned on four occasions, but without a permit. He was tried in Police Court for violations of the ordinance. It was undisputed that he used his equipment to amplify speeches in the park and that they were on religious subjects. Some witnesses testified that they were annoyed by the sound, though not by the content of the addresses; others were not disturbed by either. The court upheld the ordinance against the contention that it violated appellant's rights of freedom of speech, assembly, and wor-

^{13 [}Footnotes renumbered.] The ordinance, insofar as pertinent, reads as follows:

[&]quot;Section 2. Radio devices, etc.—It shall be unlawful for any person to maintain and operate in any building, or on any premises or on any automobile, motor truck or other motor vehicle, any radio device, mechanical device, or loud speaker or any device of any kind whereby the sound therefrom is cast directly upon the streets and public places and where such device is maintained for advertising purposes or for the purpose of attracting the attention of the passing public, or which is so placed and operated that the sounds coming therefrom can be heard to the annoyance or inconvenience of travelers upon any street or public places or of persons in neighboring premises.

[&]quot;Section 3. Exception.—Public dissemination, through radio, loudspeakers, of items of news and matters of public concern and athletic activities shall not be deemed a violation of this section provided that the same be done under permission obtained from the Chief of Police."

Appellant's conduct was regarded throughout as falling within the types of activity enumerated in § 3. We take the ordinance as construed by the State courts.

ship under the Federal Constitution. Fines and jail sentences were imposed. His convictions were affirmed without opinion by the County Court for Niagara County and by the New York Court of Appeals, 297 N.Y. 659, 70 N.E.2d 323. The case is here on appeal.

We hold that § 3 of this ordinance is unconstitutional on its face, for it establishes a previous restraint on the right of free speech in violation of the First Amendment which is protected by the Fourteenth Amendment against State action. To use a loud-speaker or amplifier one has to get a permit from the Chief of Police. There are no standards prescribed for the exercise of his discretion. The statute is not narrowly drawn to regulate the hours or places of use of loud-speakers, or the volume of sound (the decibels) to which they must be adjusted. The ordinance therefore has all the vices of the ones which we struck down in Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352; Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; and Hague v. C. I. O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423.

In the Cantwell case a license had to be obtained in order to distribute religious literature. What was religious was left to the discretion of a public official. We held that judicial review to rectify abuses in the licensing system did not save the ordinance from condemnation on the grounds of previous restraint. Lovell v. Griffin, supra, held void on its face an ordinance requiring a license for the distribution of literature. That ordinance, like the present one, was dressed in the garb of the control of a "nuisance." But the Court made short shrift of the argument, saying that approval of the licensing system would institute censorship "in its baldest form." In Hague v. C. I. O., supra, we struck down a city ordinance which required a license from a local official for a public assembly on the streets or highways or in the public parks or public buildings. The official was empowered to refuse the permit if in his opinion the refusal would prevent "riots, disturbances or disorderly assemblage," We held that the ordinance was void on its face because it could be made "the instrument of arbitrary suppression of free expression of views on national affairs." 307 U.S. page 516, 59 S.Ct. page 964, 83 L.Ed. 1423.

The present ordinance has the same defects. The right to be heard is placed in the uncontrolled discretion of the Chief of Police. He stands athwart the channels of communication as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal. A more effective previous restraint is difficult to imagine. Unless we are to retreat from the firm positions we have taken in the past, we must give freedom

of speech in this case the same preferred treatment that we gave freedom of religion in the Cantwell case, freedom of the press in the Griffin case, and freedom of speech and assembly in the Hague case. 13

Loud-speakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. It is the way people are reached. Must a candidate for governor or the Congress depend on the whim or caprice of the Chief of Police in order to use his sound truck for campaigning? Must he prove to the satisfaction of that official that his noise will not be annoying to people?

The present ordinance would be a dangerous weapon if it were allowed to get a hold on our public life. Noise can be regulated by regulating decibels. The hours and place of public discussion can be controlled. But to allow the police to bar the use of loud-speakers because their use can be abused is like barring radio receivers because they too make a noise. The police need not be given the power to deny a man the use of his radio in order to protect a neighbor against sleepless nights. The same is true here.

Any abuses which loud-speakers create can be controlled by narrowly drawn statutes. When a city allows an official to ban them in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas. In this case a permit is denied because some persons were said to have found the sound annoying. In the next one a permit may be denied because some

¹³ Cox v. New Hampshire, 312 U.S. 569, 577, 578, 61 S.Ct. 762, 763, 85 L.Ed. 1049, 133 A.L.R. 1396, did not depart from the rule of these earlier cases but re-emphasized the vice of the type of ordinance we have here. Davis v. Massachusetts, 167 U.S. 43, 17 S.Ct. 731, 42 L.Ed. 71, was distinguished in the Hague case, 307 U.S. pages 514-516, 59 S.Ct. pages 963, 964, 83 L.Ed. 1423, which likewise involved an ordinance regulating the use of public streets and parks. It was there said, "We have no occasion to determine whether, on the facts disclosed, the Davis Case was rightly decided, but we cannot agree that it rules the instant case. Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

We adhere to that view. Though the statement was that of only three Justices it plainly indicated the route the majority followed, who on the merits did not consider the Davis case to be controlling.

people find the ideas annoying. Annoyance at ideas can be cloaked in annoyance at sound. The power of censorship inherent in this type of ordinance reveals its vice.

Courts must balance the various community interests in passing on the constitutionality of local regulations of the character involved here. But in that process they should be mindful to keep the freedoms of the First Amendment in a preferred position. See Marsh v. Alabama, 326 U.S. 501, 509, 66 S.Ct. 276, 280, 90 L.Ed. 265.

Reversed.

Mr. Justice Frankfurter, with whom Mr. Justice Reed and Mr. Justice Burton concur, dissenting.

The appellant's loud speakers blared forth in a small park in a small city. The park was about 1,600 feet long and from 250 to 400 feet wide. It was used primarily for recreation, containing benches, picnic and athletic facilities, and a children's wading pool and playground. Estimates of the range of the sound equipment varied from about 200 to 600 feet. The attention of a large fraction of the area of the park was thus commanded.

The native power of human speech can interfere little with the self-protection of those who do not wish to listen. They may easily move beyond earshot, just as those who do not choose to read need not have their attention bludgeoned by undesired reading matter. And so utterances by speech or pen can neither be forbidden nor licensed, save in the familiar classes of exceptional situations. Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; Hague v. CIO, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423; Schneider v. Irvington, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031. But modern devices for amplifying the range and volume of the voice, or its recording, afford easy, too easy, opportunities for aural aggression. If uncontrolled, the result is intrusion into cherished privacy. The refreshment of mere silence, or meditation, or quiet conversation, may be disturbed or precluded by noise beyond one's personal control.

Municipalities have conscientiously sought to deal with the new problems to which sound equipment has given rise and have devised various methods of control to make city life endurable. See McIntyre and Rhyne, Radio and Municipal Regulations (National Institute of Municipal Law Officers, Report No. 62, 1940) pp. 28 et seq. Surely there is not a constitutional right to force unwilling people to listen. Cf. Otto, Speech and Freedom of Speech, in Freedom and Experience (Edited by Hook and Konvitz, 1947) 78,

¹⁴ The last census gave the population of Lockport as 24,379.

83 et seq. And so I cannot agree that we must deny the right of a State to control these broadcasting devices so as to safeguard the rights of others not to be assailed by intrusive noise but to be free to put their freedom of mind and attention to uses of their own choice.

Coming to the facts of the immediate situation, I cannot say that it was beyond constitutional limits to refuse a license to the appellant for the time and place requested. The State was entitled to authorize the local authorities of Lockport to determine that the well-being of those of its inhabitants who sought quiet and other pleasures that a park affords, outweighed the appellant's right to force his message upon them. Nor did it exceed the bounds of reason for the chief of police to base his decision refusing a license upon the fact that the manner in which the license had been used in the past was destructive of the enjoyment of the park by those for whom it was maintained. people complained about an annoyance would seem to be a pretty solid basis in experience for not sanctioning its continuance.

Very different considerations come into play when the free exercise of religion is subjected to a licensing system whereby a minor official determines whether a cause is religious. This was the problem presented by Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352, and of course we held that "Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth." 310 U.S. at 305, 60 S.Ct. at 904, 84 L.Ed. 1213, 128 A.L.R. 1352. To determine whether a cause is, or is not, "religious" opens up too wide a field of personal judgment to be left to the mere discretion of an official. As to the allowable range of judgment regarding the scope of "religion." see Judge Augustus N. Hand in United States v. Kauten, 2 Cir., 133 F.2d 703, 708. The matter before us is of guite a different order. It is not unconstitutional for a State to vest in a public official the determination of what is in effect a nuisance merely because such authority may be outrageously misused by trying to stifle the expression of some undesired opinion under the meretricious cloak of a nuisance. Judicial remedies are available for such abuse of authority, and courts, including this Court, exist to enforce such remedies.

Even the power to limit the abuse of sound equipment may not be exercised with a partiality unrelated to the nuisance. But there is here no showing of either arbitrary action or discrimination. There is no basis for finding that noisemakers similar to appellant would have obtained a license for the time and place requested. Reference is found in the testimony to the use of loudspeakers for Lutheran services in a nearby ballfield. But the ballfield was outside the park in which appellant blared to his audience, and there is nothing in the record to show that the Lutherans could have used their amplifying equipment within the park, or that the appellant would have been denied permission to use such equipment in the ballfield. See Lehon v. Atlanta, 242 U.S. 53, 37 S.Ct. 70, 61 L.Ed. 145. State action cannot be found hypothetically unconstitutional. New York ex rel. Hatch v. Reardon, 204 U.S. 152, 27 S.Ct. 188, 51 L.Ed. 415, 9 Ann.Cas. 736.

The men whose labors brought forth the Constitution of the United States had the street outside Independence Hall covered with earth so that their deliberations might not be disturbed by passing traffic. Our democracy presupposes the deliberative process as a condition of thought and of responsible choice by the electorate. To the Founding Fathers it would hardly seem a proof of progress in the development of our democracy that the blare of sound trucks must be treated as a necessary medium in the deliberative process. In any event, it would startle them to learn that the manner and extent of the control of the blare of the sound trucks by the States of the Union, when such control is not arbitrarily and discriminatorily exercised, must satisfy what this Court thinks is the desirable scope and manner of exercising such control.

We are dealing with new technological devices and with attempts to control them in order to gain their benefits while maintaining the precious freedom of privacy. These attempts, being experimental, are bound to be tentative, and the views I have expressed are directed towards the circumstances of the immediate case. Suffice it to say that the limitations by New York upon the exercise of appellant's rights of utterance did not in my view exceed the accommodation between the conflicting interests which the State was here entitled to make in view of time and place and circumstances. See Cox v. New Hampshire, 312 U.S. 569, 61 S. Ct. 762, 85 L.Ed. 1049, 133 A.L.R. 1396.

MR. JUSTICE JACKSON, dissenting. I dissent from this decision, which seems to me neither judicious nor sound and to endanger the great right of free speech by making it ridiculous and obnoxious, more than the ordinance in question menaces free speech by regulating use of loud-speakers. Let us state some facts which the Court omits:

The City of Lockport, New York, owns and maintains a public park of some 28 acres dedicated by deed to "Park purposes exclusively." The scene of action in this case is an area therein set apart for the people's recreation. The City had provided it with tables, benches, and fireplaces for picnic parties, a playground

and wading pool for children, and facilities for such games as horseshoe pitching, bowling and baseball.

The appellant, one of Jehovah's Witnesses, contends, and the Court holds, that without the permission required by city ordinance he may set up a sound truck so as to flood this area with amplified lectures on religious subjects. It must be remembered that he demands even more than the right to speak and hold a meeting in this area which is reserved for other and quite inconsistent purposes. He located his car, on which loud-speakers were mounted, either in the park itself, not open to vehicles, or in the street close by. The microphone for the speaker was located some little distance from the car and in the park, and electric wires were strung, in one or more instances apparently across the sidewalk, from the one to the other. So that what the Court is holding, is that the Constitution of the United States forbids a city to require a permit for a private person to erect, in its streets, parks and public places, a temporary public address system, which certainly has potentialities of annoyance and even injury to park patrons if carelessly handled. It was for setting up this system of microphone, wires and sound truck without a permit, that this appellant was convicted—it was not for speaking.

It is astonishing news to me if the Constitution prohibits a municipality from policing, controlling or forbidding erection of such equipment by a private party in a public park. Certainly precautions against annoyance or injury from operation of such devices are not only appropriate, but I should think a duty of the city in supervising such public premises. And a very appropriate means to supervision is a permit which will inform the city's police officers of the time and place when such apparatus is to be installed in the park. I think it is a startling perversion of the Constitution to say that it wrests away from the states and their subdivisions all control of the public property so that they cannot regulate or prohibit the irresponsible introduction of contrivances of this sort into public places.

The Court, however, ignores the aspects of the matter that grow out of setting up the system of amplifying appliances, wires and microphones on public property, which distinguish it from the cases cited as authority. It treats the issue only as one of free speech. To my mind this is not a free speech issue.¹⁵ Lockport

¹⁵ More than fifty years ago this Court in Davis v. Massachusetts, 167 U.S. 43, 17 S.Ct. 731, 42 L.Ed. 71, affirmed a state court decision (162 Mass. 510, 39 N.E. 113, 26 L.R.A. 712, 44 Am.St.Rep. 389) written by Mr. Justice Holmes and holding constitutional an ordinance providing that "no person shall, in or upon any of the public grounds, make any public address * * * except in accordance with a permit from the mayor." Mr. Justice Holmes had pointed out that the attack on the ordinance's constitutionality "assumes that the

has in no way denied or restricted the free use, even in its park, of all of the facilities for speech with which nature has endowed the appellant. It has not even interfered with his inviting an assemblage in a park space not set aside for that purpose. But can it be that society has no control of apparatus which, when put to unregulated proselyting, propaganda and commercial uses, can render life unbearable? It is intimated that the City can control the decibels; if so, why may it not prescribe zero decibels as appropriate to some places? It seems to me that society has the right to control, as to place, time and volume, the use of loud-speaking devices for any purpose, provided its regulations are not unduly arbitrary, capricious or discriminatory.

But the Court points out that propagation of his religion is the avowed and only purpose of appellant and holds that Lockport cannot stop the use of loud-speaker systems on its public property for that purpose. If it is to be treated as a case merely of religious teaching, I still could not agree with the decision. Only a few weeks ago we held that the Constitution prohibits a state or municipality from using tax-supported property "to aid religious groups to spread their faith." People of State of Illinois

ordinance is directed against free speech generally, * * * whereas in fact it is directed toward the modes in which Boston Common may be used." That case, directly in point here, and approving a regulation of the right of speech itself, certainly controls this one, which involves only regulation of the use of amplifying devices, and, as applied to this appellant, forbade only unauthorized use in a park dedicated exclusively to park purposes. Moreover, the Davis case approved the requirement that a permit be obtained from a city official before "any public address" could be made "in or upon any of the public grounds."

The Davis case was not overruled in the cases cited by the Court. And all of those cases were considered and distinguished in Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049, 133 A.L.R. 1396, written by Mr. Chief Justice Hughes for a unanimous Court, and which approved regulation and licensing of parades and processions in public streets even for admittedly religious purposes.

The case of Hague v. C. I. O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423, cannot properly be quoted in this connection, for no opinion therein was adhered to by a majority of the Court. The quotation in the Court's opinion today had the support of only two Justices, with a possible third. The failure of six or seven Justices to subscribe to those views would seem to fatally impair the standing of that quotation as an authority.

16 Nothing in the ordinance interferes with freedom of religion, freedom of assembly or freedom of the press. Indeed, the effect of § 3 which the Court summarily strikes down as void on its face, is to authorize the Chief of Police to permit use of "radio devices, mechanical devices, or loud speakers" where the subject matter is "news and matters of public concern and athletic activities" even though "the sound therefrom is cast directly upon the streets and public places" and "the sounds coming therefrom can be heard to the annoyance or inconvenience of the travelers upon any street or public places or of persons in neighboring premises" which would, without § 3, be barred by § 2.

ex rel. McCollum v. Board of Education, 333 U.S. 203, 68 S.Ct. 461, 464. Today we say it compels them to let it be used for that purpose. In the one case the public property was appropriated to school uses; today it is public property appropriated and equipped for recreational purposes. I think Lockport had the right to allocate its public property to those purposes and to keep out of it installations of devices which would flood the area with religious appeals obnoxious to many and thereby deprive the public of the enjoyment of the property for the purposes for which it was properly set aside. And I cannot see how we can read the Constitution one day to forbid and the next day to compel use of public tax-supported property to help a religious sect spread its faith.

There is not the slightest evidence of discrimination or prejudice against the appellant because of his religion or his ideas. This same appellant, not a resident of Lockport but of Buffalo, by the way, was granted a permit by the Chief of Police and used this park for four successive Sundays during the same summer in question. What has been refused is his application for a second series of four more uses of the park. Lockport is in a climate which has only about three months of weather adaptable for park use. There are 256 recognized religious denominations in the United States and even if the Lockport populace supports only a few of these, it is apparent that Jehovah's Witnesses were granted more than their share of the Sunday time available on any fair allocation of it among denominations.

There is no evidence that any other denomination has ever been permitted to hold meetings or, for that matter, has ever sought to hold them in the recreation area. It appears that on one of the Sundays in question the Lutherans were using the ball park. This also appears to be public property. It is equipped with installed loud-speakers, a grandstand and bleachers, and surrounded by a fence six feet high. There is no indication that these facilities would not be granted to Jehovah's Witnesses on the same terms as to the Lutherans. It is evident, however, that Jehovah's Witnesses did not want an enclosed spot to which those who wanted to hear their message could resort. Appellant wanted to thrust their message upon people who were in the park for recreation, a type of conduct which invades other persons' privacy and, if it has no other control, may lead to riots and disorder.

The Court expresses great concern lest the loud-speakers of political candidates be controlled if Jehovah's Witnesses can be. That does not worry me. Even political candidates ought not to be allowed irresponsibly to set up sound equipment in all sorts of public places, and few of them would regard it as tactful campaigning to thrust themselves upon picnicking families who do not want to hear their message. I think the Court is over con-

cerned about danger to political candidacies and I would deal with that problem when, and if, it arises.

But it is said the state or municipality may not delegate such authority to a Chief of Police. I am unable to see why a state or city may not judge for itself whether a Police Chief is the appropriate authority to control permits for setting up sound-amplifying apparatus. Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049, 133 A.L.R. 1396. It also is suggested that the city fathers have not given sufficient guidance to his discretion. But I did not suppose our function was that of a council of revision. The issue before us is whether what has been done has deprived this appellant of a constitutional right. It is the law as applied that we review, not the abstract, academic questions which it might raise in some more doubtful case.

I disagree entirely with the idea that "Courts must balance the various community interests in passing on the constitutionality of local regulations of the character involved here." It is for the local communities to balance their own interests—that is politics—and what courts should keep out of. Our only function is to apply constitutional limitations.

I can only repeat the words of Mr. Justice Holmes, disregarded in his time and even less heeded now:

"I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions." ¹⁷

And even if this were a civil liberties case, I should agree with Chief Justice Hughes, writing for a unanimous Court:

"Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses." 18

The judgment of the Court of Appeals of New York should be affirmed.

¹⁷ Baldwin v. Missouri, 281 U.S. 586, 595, 50 S.Ct. 436, 439, 74 L.Ed. 1056, 72 A.L.R. 1303.

¹⁸ Cox v. New Hampshire, 312 U.S. 569, 574, 61 S.Ct. 762, 765, 85 L.Ed. 1049, 133 A.L.R. 1396.

In the present state of the decisions the drafting of ordinances which will effect a satisfactory balancing of the interests we have been considering is no simple assignment. A very helpful aid to the draftsman is the Fourth Draft of a Model Handbill Ordinance, prepared by the National Institute of Municipal Law Officers. Municipalities and the Law in Action 1943, 381 et seq. The model ordinance was mentioned by the Supreme Court in Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862 (1943), but the Court, of course, expressed no opinion as to the validity of such a measure.

2. The use of streets and sidewalks for commercial purposes has been the subject of much litigation. The statutory powers of municipalities are usually adequate to permit effective municipal regulation. See collection of cases in Notes 105 A.L.R. 1051 (1936) and 163 A.L.R. 1334 (1946). Affirmative authorization of the use of a street or sidewalk for commercial purposes, such as newsstands, even though done through a licensing procedure, is another matter. It involves an appropriation to private purposes for which express statutory authority is necessary. Cowin v. City of Waterloo, 237 Iowa 202, 21 N.W.2d 705, 163 A.L.R. 1327 (1946). An ordinance proscribing curb service has been upheld as a not unreasonable street regulation as applied to areas where congestion is likely. People v. Dmytro, 280 Mich. 82, 273 N.W. 40, 111 A.L.R. 128 (1937).

B. CULTURAL AND RECREATIONAL FACILITIES

"Before the approval by the planning board of a plat showing a new street or highway, such plat shall also show in proper cases and when required by the planning board a park or parks suitably located for playground or other recreation purposes. In approving such plats the planning board shall require that . . . the parks shall be of reasonable size for neighborhood playgrounds or other recreation uses . . . " New York General City Law, § 33.

As an incident to the operation of public recreational facilities, such as parks, for the benefit of the public it has been a common practice to grant restaurant and other concessions to private enterprise. There is no difficulty about the consistency of that type of arrangement with the public purposes to which the facilities are devoted. See Nebraska City v. Nebraska City Speed and Fair Ass'n., 107 Neb. 576, 186 N.W. 374 (1922).

Somewhat different is the situation where it is proposed to let a public auditorium, for example, to a private person for operation as a theater or other use to which it is adapted. There

the private activity is not merely incidental to the public use. If the object and effect of the arrangement would simply be private use for a price when the property was not required for public use it could be urged that it would be within the general power of the local unit over property held by it for public use. In a recent Montana case, a five-year lease, for motion picture theater use, of a large auditorium in the civic center of the City of Great Falls was upheld on this theory. Colwell v. City of Great Falls, 117 Mont. 126, 157 P.2d 1013 (1945). The building, which had been constructed as a PWA project, contained municipal offices, an exhibition room, a banquet room and a sports arena, in addition to the auditorium. Public demand for the use of the auditorium was meagre. The lease reserved to the city the right to use the facility for conventions and public gatherings. A contrary result was reached in City of Bessemer v. Huey, 247 Ala. 12, 22 So.2d 325 (1945), but the ruling was made on demurrer to a taxpayer's suit to enjoin the carrying out of an auditorium lease and the bill alleged that the lease was for exclusive use as a theatre for white patrons only. On that state of facts there was no reservation making the premises available for such public use as might be required and the lease discriminated against a racial group in the community. The court considered specific statutory authority necessary to support the lease: it could not be squared with the public purposes to which the building was devoted.

Public libraries are an appropriate function of local government the importance of which is too often not appreciated. The Supreme Court of North Carolina has recognized that, in a populous, industrial city, like Durham, parks and playgrounds are necessary objects of expenditure within the meaning of Section 7 of Article VII of the state constitution, which requires approval of a majority of the qualified voters of a county or municipality in the case of a debt or tax for other than "necessary expenses." Atkins v. Durham, 210 N.C. 295, 186 S.E. 330 (1936). Cf. Twining v. Wilmington, 214 N.C. 655, 200 S.E. 416 (1939). The court, however, has refused to place public libraries in that category. Westbrook v. Southern Pines, 215 N.C. 20, 1 S.E.2d 95 (1939); Twining v. Wilmington, supra. See Albert Coates and Wm. S. Mitchell, "'Necessary Expenses' Within the Meaning of Article VII. Section 7 of the North Carolina Constitution" 18 N.C.L.Rev. 93 (1940). The state legislature is more sensitive to the responsibility of local government in providing library The activity is one with respect to which functional consolidation is likely to be highly appropriate and North Carolina is among the states which authorize that device as to libraries. Gen.Stats. of N.C. § 160-77 (1943), as amended by N.C.Pub.Laws 1945, c. 401.

Carnegie libraries are usually owned and administered as free public services by private non-profit corporations. Enabling legislation authorizing local units to contribute to the support of such libraries is common. E. g. N.C.Gen.Stat. § 160-75 (1943); Williams Tenn.Code Ann. § 2298 et seq. (1943 replacement vol.). So far as the writer has been able to determine, the method of library support has never been seriously jeopardized by an attack on the ground that public funds were being expended by private hands without official accountability. Cf. Brister v. Leflore County, 156 Miss. 240, 125 So. 816 (1930); Egan v. City and County of San Francisco, 165 Cal. 576, 133 P. 294 (1913); Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88 (S.C.1947).

KERR v. ENOCH PRATT FREE LIBRARY OF BALTIMORE CITY

Circuit Court of Appeals of the United States, Fourth Circuit, 1945. 149 F.2d 212.

SOPER, CIRCUIT JUDGE. This suit is brought by Louise Kerr, a young Negress, who complains that she has been refused admission to a library training class conducted by The Enoch Pratt Free Library of Baltimore City to prepare persons for staff positions in the Central Library and its branches. It is charged that the Library is performing a governmental function and that she was rejected in conformity with the uniform policy of the library corporation to exclude all persons of the colored race from the training school, and that by this action the State of Maryland deprives her of the equal protection of the laws in violation of § 1 of the Fourteenth Amendment of the Constitution of the United States and of the Civil Rights Act codified in 8 U.S.C.A. § 41. She asks for damages, as provided in that act, 8 U.S.C.A. § 43, for a permanent injunction prohibiting the refusal of her application, and for a declaratory judgment to establish her right to have her application considered without discrimination because of her race and color. Her father joins in the suit as a taxpayer, and asks that, if it be held that the library corporation is a private body not bound by the constitutional restraint upon state action, the Mayor and City Council of Baltimore be enjoined from making contributions to the support of the Library from the municipal funds on the ground that such contributions are ultra vires and in violation of the Fourteenth Amendment since they constitute a taking of his property without due process of law.

The defendants in the suit are the library corporation, nine citizens of Baltimore who constitute its board of trustees, the librarian and the Mayor and City Council of Baltimore. The defendants first named defend on two grounds: (1) That the plaintiff was not excluded from the Training School solely because of her race and color; and (2) that the Library is a private corporation, controlled and managed by the board of trustees, and does not perform any public function as a representative of the state. The municipality joins in the second defense and also denies that its appropriations to the Library are ultra vires or constitute a taking of property without due process of law. The District Judge sustained all of the defenses and dismissed the suit.

In our view it is necessary to consider only the first two defenses which raise the vital issues in the case. It is not denied that the applicant is well qualified to enter the training school. She is a native and resident of Baltimore City, twenty-seven years of age, of good character and reputation, and in good health. She is a graduate with high averages from the public high schools of Baltimore, from a public teachers' training school in Baltimore, has taken courses for three summers at the University of Pennsylvania, and has taught in the elementary public schools of the City. We must therefore consider whether in fact she was excluded from the training school because of her race, and if so, whether this action was contrary to the provisions of the federal constitution and laws.

There can be no doubt that the applicant was excluded from the school because of her race. The training course was established by the Library in 1928, primarily to prepare persons for the position of library assistant on the Library staff. There is no other training school for librarians in the state supported by public funds. Applicants are required to take a competitive entrance examination which, in view of the large number of applications for each class, is limited to fifteen or twenty persons who are selected by the director of the Library and his assistants as best qualified to function well in the work in view of their initiative, personality, enthusiasm and serious purpose. Members of the class are paid \$50 monthly during training, since the practical work which they perform is equivalent to part time employment. In return for the training given, the applicant is expected to work on the staff one year after graduation, provided a position is offered. All competent graduates have been in fact appointed to the staff as library assistants, and during the past two or three years there have been more vacancies than graduates.

During the existence of the school, more than two hundred applications have been received from Negroes. All of them have been rejected. On June 14, 1933, the trustees of the Library formally resolved to make no change in the policy, then existing, not to employ Negro assistants on the Library service staff "in view of the public criticism which would arise and the effect upon the morale of the staff and the public." This practice was followed until 1942 when the trustees engaged two Negroes, who had not attended the Training School, as technical assistants for service in a branch of the Library which is patronized chiefly by Negroes. There are in all seventy senior and eighty junior library assistants employed at the Central Building and the twenty-six branches. There is no segregation of the races in any of them and white and colored patrons are served alike without discrimination. The population of Baltimore City is approximately eighty per cent white and twenty per cent colored.

Notwithstanding the appointment of two colored assistants in one branch of the Library, the board of trustees continued to exclude Negroes from the Training School for the reasons set forth in the following resolution passed by it on September 17, 1942:

"Resolved that it is unnecessary and unpracticable to admit colored persons to the Training Class of The Enoch Pratt Free Library. The trustees being advised that there are colored persons now available with adequate training for library employment have given the librarian authority to employ such personnel where vacancies occur in a branch or branches with an established record of preponderant colored use."

It was in accordance with this policy that the application made by the plaintiff on April 23, 1943, was denied.

The view that the action of the Board in excluding her was not based solely on her race or color rests on the contention that as the only positions as librarian assistants, which are open to Negroes, were filled at the time of her application, and as a number of adequately trained colored persons in the community were then available for appointment, should a vacancy occur, it would have been a waste of her time and a useless expense to the Library to admit her. The resolution of September 17, 1942, and the testimony given on the part of the defendants indicate that these were in fact the reasons which led to the plaintiff's rejection, and that the trustees were not moved by personal hostility or prejudice against the Negro race but by the belief that white library assistants can render more acceptable and more efficient service to the public where the majority of the patrons are white. The District Judge so found and we accept his finding. But it is nevertheless true that the applicant's race

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was the only ground for the action upon her application. She was refused consideration because the Training School is closed to Negroes, and it is closed to Negroes because, in the judgment of the Board, their race unfits them to serve in predominantly white neighborhoods. We must therefore determine whether, in view of the prohibition of the Fourteenth Amendment, the Board is occupying tenable ground in excluding Negroes from the Training School and from positions on the Library's staff.

The District Judge found that the Board of Trustees controls and manages the affairs of the Library as a private corporation and does not act in a public capacity as a representative of the state. Hence he held that the Board is not subject to the restraints of the Fourteenth Amendment which are imposed only upon state action that abridges the privileges or immunities of citizens of the United States or denies to any person the equal protection of the laws. His opinion, D.C., 54 F.Supp. 514, reviews at length the corporate history of the institution and applies the rule, enunciated in state and federal courts, that to make a corporation a public one its managers must not only be appointed by public authority, but subject to its control. See 18 C.J.S., Corporations, § 19, p. 394 et seq.; Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 671, 4 L.Ed. 629.

The Court of Appeals of Maryland has used this test in somewhat similar cases and has held corporations to be private in character although public funds have been placed at their disposal to aid them in serving the public in the exercise of functions which could appropriately be performed by the state it-For example, the rule was applied in Clark v. Maryland Institute, 87 Md. 643, 41 A. 126, where a colored youth was refused admission to an educational institution to which he had been appointed by a member of the City Council of Baltimore under a contract between the City and the Institute which authorized each member of the Council to make one appointment in consideration of an annual appropriation by the City of \$9,000 per year for the education of the pupils. It was held that the Institute was within its rights in excluding colored persons because it was a private corporation and not an agency of the state, subject to the provisions of the Fourteenth Amendment. See also St. Mary's Industrial School v. Brown, 45 Md. 310; Finan v. City of Cumberland, 154 Md. 563, 141 A. 269; University of Maryland v. Murray, 169 Md. 478, 182 A. 590, 103 A.L.R. 706; University of Maryland v. Mass, 173 Md. 554, 197 A. 123; University of Maryland v. Williams, 9 Gill & J. 365, 31 Am.Dec. 72.

These decisions are persuasive but in none of them was the corporation under examination completely owned and supported FORDHAM LOCAL GOV.U.C.B.

from its inception by the state as was the library corporation in the pending case. Moreover, a federal question is involved which the federal courts must decide for themselves so that a final and uniform interpretation may be given to the Constitution, the supreme law of the land; and in the performance of this duty in the pending case, we should not be governed merely by technical rules of law, but should appraise the facts in order to determine whether the board of trustees of the library corporation may be classified as "representatives of the state to such an extent and in such a sense that the great restraints of the Constitution set limits to their action." Nixon v. Condon, 286 U.S. 73, 88, 89, 52 S.Ct. 484, 487, 76 L.Ed. 984, 88 A.L.R. 458; Smith v. Allwright, 321 U.S. 649, 662, 64 S.Ct. 757, 151 A.L.R. 1110.

With this test in view, we must examine the legal background and the activities of the Library. It was established in 1882 through the philanthropy of Enoch Pratt, a citizen of Baltimore. His purpose was to create an institution which would belong to the City of Baltimore and serve all of its people: but he was fearful lest its management might fall into the hands of local politicians who would impair its efficiency by using it for selfish Accordingly, he erected and furnished a central purposes. library building at a cost of \$225,000 and provided a fund of \$833,000 and gave them to the city on condition that the city would create a perpetual annuity of \$50,000 to be paid to the Board of Trustees for the maintenance of the Library and the erection and maintenance of four branches. But he also made it a condition of the gift that a Board of Trustees, to be selected by him from the citizens of Baltimore, be incorporated, with the power to manage the Library and fill all vacancies on the Board irrespective of religious or political grounds, and with the duty to make an annual report to the city showing the proceedings, the condition of the Library, and its receipts and disbursements for the year. These conditions were met: the corporation was formed, and the conveyances by gift were made to and accepted by the city which assumed the required obligations.

The steps by which these objects were given legal effect included an Act of the Legislature of Maryland of March 30, 1882, Acts 1882, Ch. 181; Ordinance No. 106 of the city of July 15, 1882, Ordinance No. 64 of May 14, 1883, and Ordinance No. 145 of October 10, 1884. The Act described the terms of the gift and the means which it offered to perpetually promote and diffuse knowledge among the people of the city, empowered the city to accept the gift and to agree by ordinance, to be approved by the voters of the city, to make the stipulated annual payment and directed the city to appoint a visitor to examine the books

and accounts of the trustees annually and report to the city, and in case of abuse by the trustees to resort to the proper courts to enforce the performance of the trust. The Act also named nine citizens of Baltimore to constitute the Board of Trustees and to be a body corporate by the name of "The Enoch Pratt Free Library of Baltimore City," and empowered them to fill vacancies in the Board and to do all necessary things for the control and management of the Library and its branches, and to make all necessary by-laws and regulations for the administration of the trust and the appointment of necessary officers and agents. The trustees were directed to make an annual report to the city of their proceedings and of the condition of the Library, with a full account of receipts and disbursements. The real and personal property vested in the city by virtue of the act, as well as future acquisitions, were exempted from state and The ordinances of the city contained appropriate city taxes. provisions to give effect to the plan.

The Library was managed and conducted in accordance with these provisions until the year 1907 when Andrew Carnegie gave the city \$500,000 for the erection of twenty additional branch buildings on the sole condition that the city should provide the sites and an annual sum of not less than ten per cent of the cost of the buildings for maintenance. The city accepted the gift upon these conditions by Ordinance No. 275 of May 11, 1907, and directed that the annual appropriation be expended by the trustees for the branch libraries in such manner as might be specified by the city from year to year in its ordinance of estimates. The legislature impliedly ratified the gift by the Act of 1908. Ch. 144, by enacting an amendment to the city charter empowering the city to appropriate and pay over such sums as it might deem proper for the equipment, maintenance or support of the library, provided that the title of ownership to the property should be vested in the Mayor and City Council of Baltimore.

By the year 1927 the central library had outgrown its quarters and the Legislature of the state, by the Act of 1927, Ch. 328, authorized the city, if the voters should approve, to issue bonds in the sum of \$3,000,000 for the acquisition of additional real estate and the erection of a new building for a free public library in Baltimore City. The bond issue was authorized by Ordinance No. 1053 of April 13, 1927, which was submitted to and approved by the voters. Thereafter the city acquired the necessary land and erected thereon a modern library which constitutes the central building of the institution. Ordinance No. 1195, approved December 16, 1930, authorized the incorporation into the new site of the land previously occupied by the central building. The building has been completed and has been in use for some years

past. The Library now includes this central building and twentysix branches.

The existing fiscal arrangement between the city and the Library throws strong light on the question now under consideration. The work of the Library has been so expanded and its usefulness to the people of Baltimore has been so clearly demonstrated under the management of the Board of Trustees that the city has gradually increased its annual appropriations until they far exceed the obligations assumed by it under the gifts from Enoch Pratt and Andrew Carnegie. These obligations, as we have seen, amounted to the annual appropriation of \$50,000 to meet the condition imposed by Mr. Pratt, offset by the income from the capital sum of \$833,000 donated by him, and also the annual appropriation of \$50,000 to meet the condition of Mr. Carnegie's gift. But in addition, the city has appropriated large additional sums. The total amounted to \$511,575 in 1943 and \$650,086.90 in 1944. In addition the city pays large sums for bond interest, bond retirement, and the retirement funds for library employees which in 1944 amounted to \$82,160 for bond interest, \$86,000 for bond retirement and \$40,000 for the retirement fund, so that the city's total contribution to the Library for the year 1944 totaled the sum of \$858,246.90.

Until ten years ago the appropriations made by the city were turned over to the trustees to be expended for library purposes; but for the past ten years all disbursements from city appropriations are made through the City Bureau of Control and Accounts on vouchers submitted by the trustees to the Bureau for payment. Salary checks are issued by the city's payroll officer and charged against the Library's appropriation. Library employees are not under the city's merit system, but their salaries conform to the city's salary scale and if an increase in salary or the creation of a new position is desired, the trustees are obliged to take up the matter with the Board of Estimates. The trustees submit an itemized budget to the city which is reviewed by the city's budget committee and the library budget is included in the regular city budget. All of the income of the Library is thus received from and disbursed by the city with the exception of an annual income of special gifts which has recently averaged from \$6,000 to \$8,000 annually or about one per cent of the city's outlay.

By the Act of Legislature of 1939, Ch. 16, the city was authorized to include library employees within the municipal employees' retirement system, and this arrangement was accomplished upon the request of the trustees of the Library by Ordinance No. 961 of May 29, 1939. The annual contribution of the city to the retirement fund for library employees is about \$40,000.

From this recital certain conclusions may be safely drawn. First. The purpose which inspired the founder to make the gift and led the state to accept it, was to establish an institution to promote and diffuse knowledge and education amongst all the people.

Second. The donor could have formed a private corporation under the general permissive statutes of Maryland with power both to own the property and to manage the business of the Library independent of the state. He chose instead to seek the aid of the state to found a public institution to be owned and supported by the city but to be operated by a self perpetuating board of trustees to safeguard it from political manipulation; and this was accomplished by special act of the legislature with the result that the powers and obligations of the city and the trustees were not conferred by Mr. Pratt but by the state at the very inception of the enterprise. They were in truth created by the state in accordance with a plan which was in quite general operation in the Southern and Eastern parts of the United States at the time.*

Third, during the sixty years that have passed since the Library was established, the city's interests have been greatly extended and increased, as the donor doubtless foresaw would be the case, until the existence and maintenance of the central library and its twenty-six branches as now conducted are completely dependent upon the city's voluntary appropriations. So great have become the demands upon the city that it now requires the budget of the Library to be submitted to the municipal budget authorities for approval and in this way the city exercises a control over the activities of the institution.

We are told that all of these weighty facts go for naught and that the Library is entirely bereft of governmental status be-

^{*} We learn from Joeckel, The Government of the American Public Library, University of Chicago Press, 1935, that the oldest form of free public library existent today is that having a corporate existence. Accurate description of the libraries comprising this group is impossible because of the many variations of legal detail but the essential distinction between these and other public libraries lies in the fact that control and sometimes ownership is vested wholly or in part in a corporation, association or similar organization which is not part of the municipal or other government. Frequently there is some form of contractual relationship between the corporation and the city. But regardless of legal organization, these libraries all render service freely to all citizens on precisely the same terms as public libraries under direct municipal control. No less than 56 or 17% of all the public libraries in American cities having a population in excess of 30,000 fall into this category. Geographically these libraries are confined to the East and especially to the South where more than one-third of the cities in the 30,000 or over population group are served by libraries of this type. The Enoch Pratt Free Library belongs to this group.

cause the executive control is vested in a self perpetuating board first named by Enoch Pratt. The District Court held that Pratt created in effect two separate trusts, one in the physical property, of which the city is the trustee, and the other a trust for management, committed to the board of trustees, and that the purpose and effect of the act of the legislature "was merely to ratify and approve the agreement between Mr. Pratt and the city, and to give the necessary authority of the state to the city to carry out the agreement"; and that the practical economic control of the Library by the city, by virtue of its large voluntary contributions, is immaterial, because "the problem must be resolved on the basis of the legal right to control and not possible practical control through withholding appropriations."

We do not agree with this analysis of the situation. It is generally recognized that the maintenance of a public library is a proper function of the state; and nowhere has the thought been better expressed than in Johnson v. Baltimore, 158 Md. 93, 103, 104, 148 A. 209, 213, 66 A.L.R. 1488, where the court said: ". . . At the present time it is generally recognized and conceded by all thoughtful people that such institutions form an integral part of a system of free public education and are among its most efficient and valuable adjuncts. An enlightened and educated public has come to be regarded as the surest safeguard for the maintenance and advancement of the progress of civilized nations. More particularly is this true in republican forms of government, wherein all citizens have a voice. It is also true that education of the people ought not to and does not stop upon their leaving school, but must be kept abreast of the time by almost constant reading and study. It would therefore seem that no more important duty or higher purpose is incumbent upon a state or municipality than to provide free public libraries for the benefit of its inhabitants."

It is equally true that the state may set up a board of trustees as an incorporated instrumentality to carry on its educational work, as it has done in the case of the University of Maryland. See University of Maryland v. Murray, 169 Md. 479, 182 A. 590, 103 A.L.R. 706; Maryland Declaration of Rights, Article 43, Md. Code 1939, Art. 77, Sec. 15. It is our view that although Pratt furnished the inspiration and the funds initially, the authority of the state was invoked to create the institution and to vest the power of ownership in one instrumentality and the power of management in another, with the injunction upon the former to see to it that the latter faithfully performed its trust. We know of no reason why the state cannot create separate agencies to carry on its work in this manner, and when it does so, they be-

come subject to the constitutional restraints imposed upon the state itself.

We think that the special charter of the Library should not be interpreted as endowing it with the power to discriminate between the people of the state on account of race and that if the charter is susceptible of this construction, it violates the Fourteenth Amendment since the Board of Trustees must be deemed the representative of the state. . . . Even if we should lay aside the approval and authority given by the state to the library at its very beginning we should find in the present relationship between them so great a degree of control over the activities and existence of the Library on the part of the state that it would be unrealistic to speak of it as a corporation entirely devoid of governmental character. It would be conceded that if the state legislature should now set up and maintain a public library and should entrust its operation to a self perpetuating board of trustees and authorize it to exclude Negroes from its benefits, the act would be unconstitutional. How then can the well known policy of the Library, so long continued and now formally expressed in the resolution of the Board, be justified as solely the act of a private organization when the state, through the municipality, continues to supply it with the means of existence.

The plaintiff has been denied a right to which she was entitled and the judgment must be reversed and the case remanded for further proceedings.

Reversed and remanded.

The United States District Court for the District of Maryland has recently ruled that action of the Board of Recreation and Parks of the City of Baltimore confining negro golfers to a nine-hole public course, while making three eighteen-hole courses with more attractive physical settings available to whites only, denied negro players equal protection of the laws. Law v. Mayor and City Council of Baltimore City, 78 F.Supp. 346 (1948). Said Judge Chesnut in concluding his opinion:

"The result of this case may probably create a difficult problem for the Board of Recreation and Parks. It is not the duty nor the function of the court, but is the primary province of the Board, to determine what shall be done in the future in order to afford equal benefits to Negro golfers on municipal golf courses in Baltimore City. The court cannot undertake to adjudicate possibilities in advance of actualities. Possibly the Board may find a fair solution for the future in continuing to reserve Car-

roll Park exclusively for Negro golfers, but also affording them the opportunity to play at Mt. Pleasant or other municipal courses during certain hours of the day or on one or more days of the week reserved for them exclusively. And if this should be the course found practicable and desirable, it would seem relevant for the Board to consider for that purpose in apportioning time, the presently relatively small number of Negro golfers."

In Griffith v. City of Los Angeles, 78 Cal.App.2d 796, 178 P.2d 793 (1947), a taxpayer failed in his effort to obtain an injunction against the use of a park, pursuant to statute, for emergency veterans housing.

It is pertinent to note here that a municipality may ordinarily accept and carry out a public charitable trust in keeping with its own objectives. Attorney General v. City of Lowell, 246 Mass. 312, 141 N.E. 45 (1912).

C. UTILITIES

The term "utilities" is used here, without attempting precision in legal expression, to refer to economic functions, which, when performed by private enterprise, have been conducted under special license or franchise from public authority. Most of them involve use of public ways dependent upon franchise. In recent years, under the active stimulation of the Federal Government, public ownership and operation of utility facilities, at all levels of government, has greatly increased. The primary interest of local government is in the provision of adequate utility services on a basis in keeping with well-planned and harmonious community development. In a particular community there is likely to be public entry into one or more utility fields but not occupation of the entire domain. See The Municipal Year Book 1946 (Int'l City Mgrs' Ass'n) 47, 49, 51 et seq. Thus, there will be presented both the problems which attend public regulation of the private utility business and those incident to government financing and operation of utility facilities. Production and distribution may be divided between public and private enterprise. A power company may buy electricity at wholesale from the Tennessee Valley Authority, for example, or, conversely, a local unit, with its own distribution system, may buy power at wholesale from a power company.

A round hundred years before the Interstate Commerce Commission was established the Vermont General Assembly delegated to town officers the power to "appoint proper persons and places for ferries" and to regulate ferry charges "according to the profits of such ferries, and price of labour." Vermont Laws

Revised, 1787 (Haswell) 77–78; quoted in Final Report of the Attorney General's Committee on Administrative Procedure 15 (1941).

It was the railroad era, however, which brought on modern utility regulation. There was a transitional period of judicial administration of common law rules as to reasonable rates and nondiscriminatory service and direct legislative regulation followed by the development of the modern regulatory commission. Quite apart from regulation under the police power, local units early achieved a measure of control through the leverage of their jurisdiction over public ways. We have seen, in Chapter 2, that legislative abuse in the granting of street franchises led to constitutional safeguards of local autonomy in such matters. In some instances, as a protection against abuse or corruption on the part of local officials, a constitutional requirement of electoral approval of street franchises was adopted. See Mich.Const. of 1908, Art. 8. § 25. The grant of a franchise to a water company, for example, might be made subject to stipulations as to rates to be charged consumers. This device is still employed in some jurisdictions, as appears from the Michigan case, which follows these introductory paragraphs.

It was not uncommon, prior to the turn of the century, to make grants of street franchises to utility companies on terms indefinite as to duration. When the matter was put to the test, the local units learned from the courts that, absent constitutional or statutory limitations, they had granted property rights in perpetuity. City of Owensboro v. Cumberland Telephone & Telegraph Co., 230 U.S. 58, 33 S.Ct. 988 (1913); Detroit v. Detroit Citizens' Street Railway Co., 184 U.S. 368, 22 S.Ct. 410 (1902). See also the very recent Alabama case of City of Bessemer v. Birmingham Electric Co., 248 Ala. 345, 27 So.2d 565 (1946), in which this result was reached as to a pre-1900 franchise. In Tennessee an indefinite franchise granted by a city, whose corporate life was limited by charter to ninety-nine years, has been declared perpetual. City of Chattanooga v. Tennessee Electric Power Co., 172 Tenn. 524, 112 S.W.2d 385 (1938). It is hardly surprising that decisions of this character provoked positive constitutional and statutory limitations upon the duration of franchises granted by local units. See, for example, Ala.Const. § 228.

The United States Supreme Court has also held that a state legislature or a local unit, acting under a clear delegation of authority from the legislature, may by contract abdicate the power to regulate the rates of private utilities. Detroit v. Detroit Citizens' Street Railway Co., supra. The question whether state power may thus be abdicated is one of state constitutional law. At the same time, it must be borne in mind that in deciding a con-

tract clause question the federal courts determine for themselves whether a contract exists. Note La.Const. of 1921, Art. XIX, § 18, which declares that the police power shall not be abridged.

If the contract rate should prove disadvantageous to the utility, it would be the party seeking relief from the commitment. Unquestionably, the state through its regulatory commission could permit a rate increase. If it had not done so, however, it would appear that the local unit should be able to hold the utility to its contract. What was, in substance, a contrary result, favorable to the utility, was reached in R. R. Com'n. of Calif. v. Los Angeles Ry. Corp., 280 U.S. 145, 50 S.Ct. 71 (1929).

The relation of the Supreme Court's theory in the Detroit case to the practical current problem whether a state may bind itself to leave a local unit with unimpaired authority to charge enough for the services of its utility, financed by revenue bonds, to meet principal and interest requirements, regardless of such police power considerations as reasonableness of rates, is discussed in Fordham, "Revenue Bond Sanctions" (1942) 42 Col.L.Rev. 395, 422–23.

In City of Texarkana, Texas, v. Arkansas Louisiana Gas Company, 306 U.S. 188, 59 S.Ct. 448 (1939), the city sought, for its people, the benefits of Section IX of the franchise, which it had granted the gas company and which read as follows:

"If Grantee shall be finally compelled to, or should voluntarily, place in (sic) any rates in the City of Texarkana, Arkansas, less than the rates granted by this Ordinance then and thereupon the lessened rate shall apply in the City of Texarkana, Texas, and Grantee shall not be authorized or permitted to charge and collect any higher rate."

The city charter expressly reserved the power to regulate rates and made all franchises subject to that reservation. The two Texarkanas are, of course, adjacent cities. In somewhat protracted Arkansas litigation it was finally determined in 1933 that certain rates, lower than those stipulated in the Texas city franchise, were applicable from a date in 1930. The Supreme Court held that the Texans were, under the franchise, entitled to the advantages of the Arkansas rates for similar periods of time. Section IX was considered not to effect an invalid delegation or abdication of the city's rate-making power since the power had actually been reserved. The utility, but not the city, was bound by the lower Arkansas rates. A review of the Texas cases satisfied the Court that Texas law permitted the city to exercise contract and regulatory powers as to rates concurrently.

The modern state utility commission is now the prevailing institutional attack upon the problem of utility regulation. The legal aspects of comprehensive commission regulation, which embraces control of original entry upon utility business, service, rates, corporate structure and securities, inter-corporate relations, records, accounts and reports, and related matters, is appropriate material for a separate course. It should be noted here that despite the obvious difficulties of effective local regulation, the method is still employed in a number of states as to one or more types of utilities and phases of regulation.

The important implications of federal regulation of railroad, motor carrier and radio broadcasting activities for local government are pretty widely appreciated. Among less well-known federal regulatory processes, which bear materially upon local government, is Federal Power Commission regulation of interstate wholesale rates for electricity and natural gas. Those rates are the principal factor affecting retail rates. Not only may interested local units file complaints with the Commission against existing interstate wholesale electric and gas rates, but they may also, in certain local retail rate cases, secure the assistance of Commission experts. For a favorable account of the effect of the Commission's work upon local communities see Charles S. Rhyne, "Municipal Interest in the Work of the Federal Power Commission" 14 Geo. Wash. L. Rev. 247 (1945). The progress made by the Commission in developing the regulatory process is calculated to influence materially the work of state and local bodies. Some state commissions, in states where governing legislation is broad enough, are following the lead of the Commission in establishing the "prudent investment" rate base in place of the "fair value" base, which in practice has been largely a matter of reproduction cost new. See Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 64 S.Ct. 281 (1944); The Municipal Year Book 1946, 336; The Book of the States 1948-49, 421 et sea.

CITY OF DETROIT v. PUBLIC UTILITIES COMMISSION

Supreme Court of Michigan, 1939. 288 Mich. 267, 286 N.W. 368.

MCALLISTER, JUSTICE. The Detroit City Gas Company during the past 30 years has manufactured, sold and distributed gas in the city of Detroit. When its charter expired in 1923, the city entered into an agreement, granting a franchise for an additional time. Such franchise had not been ratified by three-fifths majority of the electorate of the city of Detroit, and was thereafter declared invalid by this court. Walker Brothers Catering Co. v. Detroit City Gas Co., 230 Mich. 564, 203 N.W. 492. Controversy then arose between the city and the gas company as to the rates to be charged. The gas company published a schedule of rates,

whereupon the city passed an ordinance which in effect accepted these rates, but at the same time, imposed a rental charge of \$125,000 per month upon the gas company for the use of the city streets. The company then filed a bill in equity in the United States District Court for the Eastern District of Michigan to enjoin the enforcement of this rental charge, and, before the determination of such case, promulgated an increased schedule of rates. The city, thereafter, filed a bill of equity in the circuit court of Wayne county, setting forth that such rates were unreasonable and arbitrary, and prayed that the company be enjoined from putting them into effect.

The entire controversy up to this time involved manufactured gas. However, both parties had been investigating the feasibility of the use of natural gas, and as a result of such investigation, and after considerable negotiation between the gas company and the city, it was decided to substitute natural gas for manufactured gas. Since the use of natural gas would render any decision in the pending cases of temporary effect, and in order to make a new arrangement, it was agreed that consent decrees should be entered in both pending cases, terminating the litigation and providing for a new contract for the furnishing and distribution of gas. This agreement was contained in the consent decree entered in the circuit court of Wayne county, which is the proceeding of especial importance in this case.

Such decree provided that the company was to receive a certain base earning, dividing profits above this agreed amount, with the consumers. It further provided that within a specified time in the future, the company would promulgate a schedule of rates for consumers. Pursuant to the decree, the gas company afterward promulgated a schedule of rates.

On April 27, 1937, Duncan C. McCrea, prosecuting attorney for Wayne county, and a customer of the gas company, filed a petition with the Michigan public utilities commission, claiming that the plan and agreement, contained in the decree, were fraudulent, and formulated solely in the interest of the gas company, to the damage and detriment of the rights of the public. In his petition, in which he was later joined by more than fifty thousand other consumers of the gas company, he prayed that the commission take jurisdiction to investigate the methods by which the rates were established; to investigate the effect upon Michigan natural gas prices of alleged monopolistic control; and to establish just and reasonable rates. Upon the filing of the petition, the commission issued an order, setting a date for the hearing thereof, to ascertain whether it had jurisdiction to hear and determine the matters set forth in the petition, and caused notice of such hear-

ing to be served upon petitioner, the city of Detroit, and the gas company.

After an extensive hearing, and upon the opinion of the attorney general, the commission determined that it had jurisdiction under the petition to investigate and establish just and reasonable rates for natural gas in the city of Detroit.

From the order entered by the commission, the gas company and the city of Detroit appeal, contending that the commission has no jurisdiction because:

- 1. The consent decree is an agreement fixing rates between the municipality and utility, and by statute the commission has no jurisdiction where there is such a contract.
- 2. Where the franchise of a public utility has expired, only the municipality can petition the commission to fix rates, and the commission obtains no jurisdiction upon the petition of an individual consumer.
- 3. Since the suit of the city in the circuit court for Wayne county was brought by the city on behalf of all other consumers of gas, the consent decree therein entered is binding on petitioner and all other consumers.

The primary question to be determined is whether, under the arrangement now existing between the city and the gas company, the public utilities commission is excluded from jurisdiction to inquire into and determine rates.

Sec. 4 of the Public Utilities Commission Act, 2 Comp.Laws 1929, § 11009, provides, in part: "In no case shall the commission have power to change or alter the rates or charges fixed in, or regulated by, any franchise or agreement heretofore or hereafter granted or made by any city, village or township."

If there is a valid agreement or franchise granted or made by the city, fixing or regulating rates or charges, the Commission has no power to change or alter them, as rates, fixed by agreement, are not subject to control of the commission. Lenawee County Gas & Electric Co. v. City of Adrian, 209 Mich. 52, 176 N. W. 590, 10 A.L.R. 1328.

In this regard it is of importance to consider the power of a municipality to enter into a contract, fix or regulate rates to be charged by a public utility, and the necessary requisites to the exercise of such a power. A municipal corporation possesses only those powers; expressly granted; those necessarily or fairly implied in or incidental to the powers expressly granted; and those essential to the declared objects and purposes of the corporation. The latter consist of powers, not simply convenient to the exercise of the declared objects, but those indispensable thereto. Atty.

General v. Detroit Common Council, 150 Mich. 310, 113 N.W. 1107, 121 Am.St.Rep. 625; Barnhart v. City of Grand Rapids, 237 Mich. 90, 211 N.W. 96. No express power is given to the city of Detroit to regulate the rates of public utilities; and this power is not one of those essential to local self-government. City of Kalamazoo v. Titus, 208 Mich. 252, 265, 175 N.W. 480. Such power arises only from the exercise of powers necessarily implied.

Article 8, § 28, Constitution of Michigan, 1908, provides: "No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits, without the consent of the duly constituted authorities of such city, village or township; nor to transact a local business therein without first obtaining a franchise therefor from such city, village or township. The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships."

Under the above provision of the Constitution, the city has the power to fix reasonable rates as a condition to the use of its streets by a public utility. City of Kalamazoo v. Kalamazoo Circuit Judge, 200 Mich. 146, 166 N.W. 998, 1002. In the foregoing case, the court quoted from City of Noblesville v. Improvement Co., 157 Ind. 162, 60 N.E. 1032, where the court stated that a city had the unquestionable right to grant to any person, firm or corporation a franchise to occupy its streets and alleys for conveyance of gas to customers; and further:

"That the want of power to legislatively fix a rate does not prevent the execution of a contract, is illustrated by the case of City of Noblesville v. Improvement Co., supra, where it is said:

"That the city had no power to regulate the rates of its licensee makes no difference. It had the power to contract. And the power to regulate as a governmental function, and the power to contract for the same end, are quite different things. One requires the consent only of the one body, the other the consent of two. In this instance the city acted in the exercise of its power to contract, and it is therefore entitled to the benefits of its bargain.'

"In City of St. Mary's v. Hope Natural Gas Co., supra [71 W. Va. 76, 76 S.E. 841, 43 L.R.A., N.S., 994], it was held that the city might, in the control of the use of its streets, prescribe conditions including the fixing of rates for gas, and might contract therefor, even though it possessed no governmental power to fix rates.

"The distinction between fixing rates by contract and under governmental power was clearly recognized by the Supreme Court of the United States in the case of City of Detroit v. Railway Co., 184 U.S. 368, 22 S.Ct. 410, 46 L.Ed. 592, where it was said:

"'It is plain that the Legislature regarded the fixing of the rate of fare over these street railways as a subject for agreement between the parties and not as an exercise of a governmental function of a legislative character by the city authorities under a delegated power from the Legislature." . . .

In the instant case, the decree, consented to by the city and the gas company, and the provisions of agreement, contained therein, amounted to a franchise.

Was the franchise, above mentioned, valid, or was it void for failure to comply with the necessary requirements?

Article 8, § 25, Constitution of Michigan, 1908, provides: "No city or village shall have power to abridge the right of elective franchise, to loan its credit, nor to assess, levy or collect any tax or assessment for other than a public purpose. Nor shall any city or village acquire any public utility or grant any public utility franchise which is not subject to revocation at the will of the city or village, unless such proposition shall have first received the affirmative vote of three-fifths of the electors of such city or village voting thereon at a regular or special municipal election; and upon such proposition women taxpayers having the qualifications of male electors shall be entitled to vote."

There having been no vote of the electors of the city on the franchise above mentioned, it is necessary to determine whether it is subject to revocation at the will of the city. If it be not a franchise revocable at will, it is invalid as an agreement between the city and the gas company, and no legal franchise or contract, to fix or regulate rates, is in existence. To ascertain the legal effect of this agreement, it is necessary to inquire into the provisions of the decree in question.

The decree dated December 23, 1935, and entitled "City of Detroit, a Municipal Corporation of the State of Michigan, Plaintiff, v. Detroit City Gas Company, a Corporation of the State of Michigan, Defendant," after reciting that "counsel having announced that the parties hereto have arrived at a compromise and settlement of the matters in controversy in this suit and wish to set forth in this decree a preliminary statement," proceeds with the stipulated agreements of the parties with reference to the plan, that the gas company shall receive a certain base earning; that a certain amount of excess earnings shall be divided between the company and the consumers in certain proportions; and that an initial schedule of rates for natural gas "shall be promulgated by the defendant company not later than May 1, 1936."

The court further orders, adjudges and decrees that:

"XII. It is not the intention of the parties to this cause that this decree shall in any wise alter or change any of the legal or equitable rights which either of the parties hereto may have as of the time immediately before the entry of this decree, and it is understood and agreed and so decreed that any and all such legal or equitable rights of either of the parties hereto shall continue and remain in full force and effect notwithstanding any of the provisions of this decree."

"XIII. Any of the terms of this decree may be modified or terminated by the Court upon application of either of the parties hereto and on a full and complete hearing upon said application."

"XIV. It is the intention of the parties hereto that this Court shall hereafter be the forum for the determination of controversies which may arise between the parties hereto until such time as said parties shall discontinue the operation of this decree."

Signed consent to the signature and entry of the decree is endorsed by the attorneys for the gas company and for the city.

According to the terms of this consent decree, any term may be modified or terminated by the court upon application of either party, and on a full and complete hearing upon said application. Such a provision stipulating for modification or termination of any term of the decree, which includes the agreement between the parties, is not a contract or franchise, revocable at the will of the city. The parties explicitly provide that the court shall be the forum for the determination of any questions that may arise with regard to agreement; and while it is provided that the court will be the medium of settlement of controversies until such time as said parties shall discontinue the operation of the decree, there is no implication that the city alone shall have the right to discontinue the operations of the decree and the agreement contained therein. The agreement is to be modified only by the court after application and hearing. Unless the court, upon application and hearing modifies or alters the terms of the agreement, it is necessary for both the city and the gas company to agree to a discontinuation of the agreement. result of the decree was the granting of a franchise, and that the court should act as an arbitrator or adjudicate any disputes arising out of the agreement. The decree was, in effect, an agreement between the city and the gas company for the use of the streets of the city in furnishing gas to consumers and collecting charges therefor. Such franchise, not being revocable at the will of the city, was void for failure to comply with the constitutional provisions which require a three-fifths vote of the

electors of the municipality to empower the city to make such a contract and franchise.

On other grounds it can also be said that there is in existence no contract between the parties fixing rates. The consent decree provided that the gas company was to promulgate the initial schedule of rates and that it should receive a certain base earning per year; that any earnings, over and above such base earnings, were to be shared in certain proportions between the gas company and its customers. The decree, which may be said to contain the agreement between the city and the company, as is explicitly contended by counsel for the city, made no provision as to rates.

In Lenawee County Gas & Electric Co. v. City of Adrian, 209 Mich. 52, 58, 176 N.W. 590, 592, 10 A.L.R. 1328, in a case involving rates to be charged by a gas company, it was said: "Many definitions of the word 'rate' are to be found, but, as involved in the present controversy, it can broadly be said to denote the price stated or fixed for some commodity or service of general need or utility supplied to the public, measured by a specified unit or standard. Such fixed prices are sometimes classified as contract or administrative rates voluntarily fixed or agreed upon between themselves by contracting parties, and legislative rates fixed by the Legislature or its authorized agency as a paramount governmental function without consent or agreement of the parties."

The agreement neither provided a schedule of rates, nor did it determine what the rates would be. In this regard, it only provided what should be done with the net profits, resulting from the collection of rates, to be promulgated and charged in the future. The provision in the decree that the company was to have the right to determine, in the future, the initial schedule of rates, cannot be said to be an agreement or franchise of the city, fixing or regulating rates, for a public utility where its charter has expired has the right to fix rates, in the absence of a contract regulating them. Walker Brothers Catering Co. v. Detroit City Gas Co., 230 Mich. 564, 203 N.W. 492. The agreement and franchise contained in the consent decree is invalid for not having been approved by a three-fifths majority of the electorate; and it is of no effect as an agreement fixing rates, because no rates are therein provided, and the promulgation of rates in the future is left entirely in the hands of the gas company. But it is said that because the circuit court of Wayne county had previously taken jurisdiction, it was erroneous for the commission to take jurisdiction of the same subject matter. With reference to the proceedings in which the consent decree was entered, the case involved the reasonableness of rates for

artificial gas charged by the gas company after the expiration of its franchise. Prior to the time the consent decree was entered. the entire situation had changed from the time the suit was commenced, in one important respect: the controversy then concerned the rates to be charged for natural gas rather than artificial gas; and in order to escape from the maze of new issues and the tangle of controversies arising out of the ordinance as to rental charges, the promulgation of rates, and a suit in the Federal court, as well as the State court, the parties went before the circuit court and under its jurisdiction of the case, involving "reasonable" rates, made their contract and constituted the court as the arbitrator of the terms thereof. But does the fact that the court takes jurisdiction to determine the reasonableness of rates enable it to retain jurisdiction on a consent decree to provide for the rates to be charged, or a plan under which rates are to be promulgated? The court has jurisdiction to determine whether such rates are unreasonable where there is no contract and there are no proceedings before the public utilities commission.

Counsel for the gas company on the hearing before the public utilities commission was of opinion that by virtue of the terms of the consent decree, it could only be terminated by the court, upon cause shown; and in response to a question by the commission, said that he would hesitate to move without the court's permission, and stated: "When you say 'terminate it at will,' I think it requires an order from the court. I think the language was put in there deliberately . . . I think you must go to court and show cause why it should be changed, and I think that was the spirit in which this was entered into."

Counsel for the city, however, answered a similar inquiry by stating that "if the city had the right prior to the entry of the decree to revoke any part of the agreement which they had entered into and which was then embodied in the decree, they would have that right today." There was no agreement, however, until the decree was consented to and signed. Certainly, the decree, itself, requires the adjudication by the court of any controversy arising therefrom, unless, of course, both parties agree to a discontinuation of the agreement; and the city bound itself to the observance of such decree in every way it was possible for it to do in a court of law.

But the parties by consent or conduct cannot give the court jurisdiction over the subject matter where it otherwise would have no jurisdiction, Hoffmann v. Security Trust Company of Detroit, 256 Mich. 383, 239 N.W. 508; Exo v. Automobile Ins. Exchange, 259 Mich. 578, 244 N.W. 241; Orloff v. Morehead Manufacturing Co., 273 Mich. 62, 262 N.W. 736; Strandt v.

Strandt, 278 Mich. 354, 270 N.W. 709, and it is contended by the city and the gas company that the decree provides for the fixing and regulation of rates and charges. It is upon such claim that one of the most important matters of defense is urged—that the commission has no jurisdiction for the reason that there is in effect a contract regulating rates by virtue of the consent decree. If that be the case, we must hold that the court had no power to fix or establish rates. Nebraska Tel. Co. v. State, 55 Neb. 627, 76 N.W. 171, 45 L.R.A. 113; Pond, Public Utilities, § 554. The determination of whether a rate is reasonable is a judicial question, Wellman v. Railway Co., 83 Mich. 592, 620, 47 N.W. 489, but the power of fixing and regulating rates, although it may be delegated to a city to contract with reference thereto, is a legislative function and not a judicial one. City of Cadillac v. Citizens' Tel. Co., 195 Mich. 538, 544, 161 N.W. 989; City of Niles v. Gas & Electric Co., 273 Mich. 255, 263, 262 N.W. 900; City of Kalamazoo v. Kalamazoo Circuit Judge, 200 Mich. 146, 157, 166 N.W. 998: Pond. Public Utilities. §§ 546, 548, 551.

The fact that the court may have had jurisdiction of the suit to determine the reasonableness of rates did not empower it to retain jurisdiction to determine whether rates to be promulgated in the future by the company would be unreasonable; it could not determine whether the rates were reasonable, under the circumstances, because no rate schedule was in existence. If it could be considered that the court retained jurisdiction of the case by virtue of the consent decree to determine rates to be promulgated in the future, it would result in ousting the commission of all jurisdiction, where no franchise was in existence, even in case the city desired to make application to the commission. This would be contrary to the intent of the legislature, in giving the commission jurisdiction in such cases, over the rate charged by utility companies.

Municipal corporations can establish rates by contract and franchise but they have no legislative power to fix charges to be made by public utility companies. The primary authority to fix such rates is in the legislature. City of Niles v. Gas & Electric Co., 273 Mich. 255, 262 N.W. 900. The legislature may delegate such power to municipalities, but only in express terms or by necessary implication, and article 8, § 28, Const.1908 does not provide for such a delegation of power to cities. City of Kalamazoo v. Kalamazoo Circuit Judge, supra, 200 Mich. 161, 166 N.W. 998. The authority of municipalities over rates, resulting from Section 28, is a wholly different power. Because of the control of its streets reserved to the city, it has the power to contract for rates. Such authority results not from a grant of power to legislate, but from a right of contract arising out of an implied

power to fix reasonable rates by virtue of the reserved constitutional power of control of its streets.

In McCollum v. So. Bell T. & T. Co., 163 Tenn. 277, 43 S.W.2d 390, 391, it was held: "While the act . . . does not expressly state that the fixing of rates by the Public Utilities Commission is exclusive, such, in our opinion, was the legislative intent, and by the great weight of authority the courts do not have jurisdiction over such matters until they have been submitted to and passed upon by the commission"

In City of Cadillac v. Citizens' Telephone Co., 195 Mich. 538. 161 N.W. 989 where there was no contract between the municipality and utility, it was held that there was no ground for assumption of jurisdiction by a court of equity; that original jurisdiction to determine the rates had been given to the commission by the legislature and that if such court assumed jurisdiction before a determination by the commission, such action would be premature.

In the instant case, the circuit court had no jurisdiction to fix or establish rates; and the consent decree did not preclude the public utility commission from taking jurisdiction.

From the foregoing, it is our determination that:

- The agreement and franchise, contained in the consent decree not being revocable at the will of the city, was void for the reason that it was not approved by a three-fifths majority of the electorate of the city of Detroit.
- 2. The aforementioned agreement was invalid as a contract fixing rates on the expiration of the franchise, as no rates were provided therein.
- The circuit court of Wayne county had jurisdiction only to inquire into whether the rates charged were reasonable, and the matters in the decree, not being concerned therewith, were beyond its jurisdiction.
- On the expiration of a franchise to a gas company, where no contract exists with the municipality, a consumer has the right to petition the public utilities commission to fix reasonable rates.

The order of the commission is affirmed, no cost being allowed as a public question is involved.

Current data as to municipal ownership of utilities may be found in the Municipal Year Book. Apart from water and sewer facilities, municipal ownership is not as extensive as one might suppose. Thus, of 2,033 reporting cities of over 5,000 population. thirteen per centum had electric generating and distributing facilities in early 1946 and eight per centum had electric distribution systems only. The Municipal Year Book 1946, 49. This, however, would not include the county nor all the ad hoc unit properties.

The methods of acquisition of utility facilities by local units include original construction and purchase or condemnation of existing properties. In some states it is provided by constitution or statute that a franchise reserve to the local unit an option to purchase. This may or may not be mandatory. Some of these states seek to induce utilities to accept indeterminate permits, terminable only upon exercise of the reserved option, in lieu of conventional franchises. The responsibility for fixing value in condemnation may be imposed on the courts, as in Arizona. See City of Tucson v. The Tucson Gas, Electric Light & Power Co., 152 F.2d 552 (C.C.A. 9th. 1945): certiorari denied 327 U.S. 799, 66 S.Ct. 901 (1946). In California the statutory procedure for condemnation of utility properties has been confirmed by a constitutional amendment, which makes it the function of the Railroad Commission to fix the compensation to be paid. See Sacramento Municipal Utility District v. Pacific Gas and Electric Co., 72 Cal. App.2d 638, 165 P.2d 741 (1946). If a local unit may purchase but not condemn its position is a weak one unless it may construct a competing facility. A requirement that it purchase or condemn an existing facility as a condition precedent to entering the business is a further obstacle to public ownership. See generally Note 34 Col.L.Rev. 534 (1934).

In addition to the primary business of providing the particular utility service, local unit ownership may have the secondary objective of production of revenue. Revenue bond financing may keep down net earnings until the bonds have been retired but the practical effect of using that type of borrowing may be to leave a larger measure of taxing power available for other purposes, as where a unit is subject to an over-all tax limit applicable to debt service as well as other levies.

The familiar proprietary theory was employed by the Indiana court in holding that a municipality was entitled to receive a fair return upon its investment in utility facilities the same as would a private utility company. City of Logansport v. Public Service Commission, 202 Ind. 523, 177 N.E. 249, 76 A.L.R. 839 (1931). On that basis the income so earned is now subject to the Indiana gross income tax. Department of Treasury v. City of Linton, 223 Ind. 363, 60 N.E.2d 948 (1945). Although Ohio municipalities have constitutional authority to operate utilities, the case law supports legislative control over waterworks revenues to the exclusion of net profit. See Comment, 9 Ohio St.L.J. 141, 147 et seq. (1948).

In a number of states there is some measure of state utility commission regulation of local government operation of utility facilities. Extraterritorial service has come in for such regulation more commonly than intramural business. See the tabular presentation in The Book of the States 1948-49, 430, and Seward P. Reese, "State Regulation of Municipally Owned Electric Utilities" 7 Geo. Wash, L. Rev. 557 (1939). There the analogy to private utility business is more nearly perfect and the exercise of commission control more closely related to effective regulation of utility activity generally. Constitutional provisions may preclude state regulation of inside business but not stand in the way as to outside service. Thus, in Colorado, a constitutional ban on legislative delegation to a special commission of authority over municipal affairs prevents utility commission regulation of municipal electric rates for domestic service but not for extra-mural business. Town of Holyoke v. Smith, 75 Colo. 286, 226 P. 158 (1924); Public Utilities Commission of Colorado v. City of Loveland, 87 Colo. 556, 289 P. 1090 (1930); Lamar v. Town of Wiley, 80 Colo. 18, 248 P. 1009 (1926). In supporting this distinction the court relied upon the fact that the outside consumer had no voice in selecting municipal officers who fixed the rates. Would the point be valid where one municipality contracted with another for utility service to consumers in the first unit? Obviously it would not be in a case of joint ownership and operation. 13

In a state where it is clear that the state regulatory body does not have jurisdiction over a local unit utility, even as to outside service, does the judicially-enforceable common law requirement of reasonable and nondiscriminatory rates apply or is it simply a matter of contract (with bargaining strength practically all on one side)? The authorities are divided. In a recent Arizona case the contract theory was adopted by a vote of two to one. City of Phoenix v. Kasun, 54 Ariz. 470, 97 P.2d 210, 127 A.L.R. 84 (1939). This was to say, in effect, that the city was not serving as a public utility even as to outside business.

There can be little doubt that the acquisition and operation of an airport is a public purpose of an appropriate local unit. Doubt cast upon the point in recent Illinois litigation was removed by the

¹² In accord as to intra-mural business: Kitchens v. Paragould, 191 Ark. 940, 88 S.W.2d 843 (1936); Logan City v. Public Utilities Commission of Utah, 72 Utah 536, 271 P. 961 (1928).

Contra: Public Service Commission v. City of Helena, 52 Mont. 527, 159 P. 24 (1916).

¹³ Cases relating to utility commission regulation of utilities owned by local units are collected in Notes 10 A.L.R. 1432 (1921); 18 A.L.R. 946 (1922); 76 A.L.R. 851 (1932); and 127 A.L.R. 94 (1940). See also Notes 33 Col.L.Rev. 338 (1933) and 41 Yale L.J. 116 (1931).

decisions in People ex rel. Greening, State's Attorney, v. Bartholf, 388 Ill. 445, 58 N.E.2d 172 (1944), and People ex rel. Curren, State's Attorney, v. Wood, 391 Ill. 237, 62 N.E.2d 809, 161 A.L.R. 718 (1945). In all the states one or more types of local units are authorized to acquire and operate airports. Charles S. Rhyne, Airports and the Courts 17 et seq. (1944).

The costly business of acquiring land and rights in land for an airport is aggravated by the problem of "approach-protection", affecting private property in the approach area. The cheapest method (for the public and aviation) is airport zoning to control the height of structures and trees in approach lanes. Airport zoning enabling legislation exists in over thirty states. More than twenty have adopted the model measure sponsored jointly by the Civil Aeronautics Administration and the National Institute of Municipal Law Officers. The act comprehends regulation of land uses as well as height limitations. An inferior court in New Jersey has declared a Newark airport zoning ordinance unconstitutional in two cases in which judgment could have been rested simply upon want of statutory authority. Yara Engineering Corporation v. City of Newark, 132 N.J.L. 370, 40 A.2d 559 (1945); Rice v. City of Newark, 132 N.J.L. 387, 40 A.2d 561 (1945). There is as yet no reported decision on constitutionality by any court of last resort. The model act contains a forehanded provision authorizing condemnation of avigation rights where the "necessary approach protection cannot, because of constitutional limitations, be provided by airport zoning regulations under this act." One debated question affecting constitutionality is whether airport zoning involves the reciprocal benefit feature of comprehensive urban zoning. See Chas. S. Rhyne, op.cit. supra, 156 et seq.; Dix W. Noel, "Airports and their Neighbors" 19 Tenn.L.Rev. 563, 577 et seq. (1946); John M. Hunter, Jr., "The Conflicting Interests of Airport Owner and Nearby Property Owner" 11 Law and Contemp. Prob. 539, 550 et seq. (1946); Comment 23 Tex.L.Rev. 57 (1944); J. B. Fordham, "Legal Aspects of Local Planning and Zoning in Louisiana" 6 La.L.Rev. 495, 517 et seq. (1946).

The recent case of United States v. Causby, 328 U.S. 256, 66 S.Ct. 1062 (1946), bears strongly upon the problem of the protection the law affords a property owner whose premises are in the line of approach to an airport. During the War the Government had taken a non-exclusive lease of the Greensboro-High Point Airport. Thereafter there was heavy traffic by military aircraft over the Causby chicken farm, which lay about 2000 feet off the end of one runway. A plane coming in at the approved C A A glide angle would pass less than 100 feet above the farm buildings. The chickens could not make the adjustment; the Causbys went out of the chicken business but continued to live on the premises. In the

Court of Claims their contention that the Government had taken an avigation easement over their farm for which they were constitutionally entitled to compensation, under the Fifth Amendment, prevailed. On review, the Supreme Court recognized that, while the airspace in general is a public highway, the landowner owns the "immediate reaches of the enveloping atmosphere" and agreed that in this case the Government's continuous invasion of that airspace subtracted from the owner's full enjoyment of his property and amounted to the taking of an easement. For a full discussion of the case see Noel, op. cit. supra. The result consists with the Uniform Aeronautics Act, which has been adopted in North Carolina and twenty-two other states. See Charles S. Rhyne, "Federal, State and Local Jurisdiction over Civil Aviation" 11 Law and Contemp. Prob. 459, 478 (1946). Sections 3 and 4 of that act read as follows:

"Section 3. Ownership of Space.—The ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in Section 4.

"Section 4. Lawfulness of Flight.—Flight in aircraft over the lands and waters of this State is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another, without his consent, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, however, the owner or lessee of the aircraft or the aeronaut shall be liable, as provided in Section 5."

In deciding whether compensation is constitutionally due the federal courts decide for themselves the meaning of "property" as used in the Constitution but that process necessarily entails reference to state law.

It is significant that airport zoning, at least so far as height limitation goes, does not meet the type of situation presented in the Causby case. There the air operations impaired land uses which hugged the surface and created no flight hazard.

The Federal Airport Act, 60 Stat. 180 (1946), is designed to bring about, in conformity with an annually revised national plan for the development of public airports in the United States, Alaska, Hawaii and Puerto Rico, "the establishment of a Nationwide system of public airports adequate to meet the present and future needs of civil aeronautics." The Administrator of Civil Aeronautics is authorized to make grants of funds to public agencies, including municipalities and other political subdivisions, for air-

port development. The Act authorizes aggregate appropriations for the purpose, over a period of seven years beginning July 1, 1946, of \$500,000,000. The bulk of such funds (i.e. 75% of the amounts available for grants for projects) must be apportioned among the states, one-half in accordance with populations and one-half in accordance with area. All monies available for such grants, not so apportioned, constitute a discretionary fund to be used in aid of projects, regardless of the states in which located, as considered most appropriate by the Administrator in carrying out the national airport plan.

The federal grant for smaller airports is 50% of allowable project costs, except that with respect to acquisition of interests in land or the air space the percentage is 25. In the case of larger airports, the grant is such portion of allowable project costs (not to exceed 50%) as the Administrator deems appropriate, except that as to acquisition of interests in land or the airspace the percentage is not to exceed 25.

The conditions subject to which the Administrator may approve a project include assurance of (1) availability of funds to cover non-federal portion of costs. (2) completion without undue delay, (3) legal authority of the applicant to undertake the project, and (4) good title in the applicant to the landing area or its prospective acquisition. In addition it is required that the Administrator be furnished written assurances, satisfactory to him, as to various matters, including (1) fair and non-discriminatory rates, (2) availability of facilities for use by military and naval aircraft, (3) provision of space to any federal civil agency for weather-reporting, communication and air traffic control activities without charge save for such items as utility and janitor service, (4) the keeping of project costs and accounts in accordance with a standard system, (5) the making of such annual and special airport financial and operations reports as the Administrator might reasonably request and (6) the availability of the airport and its records to federal inspection upon reasonable request. To insure compliance the Administrator may prescribe sponsorship requirements. In extending federal aid a grant agreement device is employed—the Government makes an offer stating its terms, including the maximum grant, and the applicant accepts in writing.

The Act makes the construction work on a project subject to inspection and approval by the Administrator and to regulations prescribed by him. It requires that contracts for work on projects stipulate minimum wages to be predetermined by the Secretary of Labor, bans convict labor and establishes veterans' preference.

It is apparent that the Administrator can easily run into statelaw difficulties in carrying on this program unless he takes heed of the PWA experience we have already considered under the heading of Federal-Local Relations in Chapter 2 of this book and eschews continuing control of a project by having all terms and conditions fixed as definitely as possible at the time of the grant agreement. It is significant, in this connection, that a provision, in a lease of a city airport to the C A A, for free space for federal aeronautics personnel, has recently been upheld in Indiana, Murray v. Tyndall, 223 Ind. 641, 63 N.E.2d 703 (1945).

The Act is but one of several marking a shift in federal policy from administration of federal aid for public works by a general public works agency to administration of a federal aid program for a particular functional type of public work by the agency concerned with that function at the federal level.

Another federal aid development which may appropriately be mentioned here is embodied in the Hospital Survey and Construction Act, 60 Stat. 1040 (1946). That act adopts the important policy of effecting federal assistance for surveying hospital needs, planning projects and carrying on construction through a single state agency. All applications of local units for assistance under the statute must be submitted to the Surgeon General of the United States through the state agency and must be in keeping with a State plan developed by the state agency and approved by the Surgeon General. This emphasis upon state planning and state clearance of projects, thus, constitutes an important shift in one area from the old practice of direct dealings between local units and the Federal Government. An effort to have a provision requiring such channeling inserted in the Federal Airport Act failed. The states can, of course, attack the problem at the other end—they can limit the authority of local units to deal with the United States except through state channels.

D. INDUSTRIAL AND COMMERCIAL FACILITIES

Local government has a vital interest in the economic life of the community which has found expression in various ways. They have involved principally: (1) use of inducements to private enterprise and (2) direct governmental entry into industrial and commercial activity.

(1) Inducements to Private Enterprise

(a) Donations and Lending of Credit

The notion that, apart from any express constitutional provision, a tax may be levied only for a public purpose goes back at least to the opinion of Chief Justice Black in Sharpless v. Mayor,

etc., of Philadelphia, 21 Pa.St. 147 (1853). In 1875, in the famous case of Loan Association v. Topeka, 20 Wall. 655, 22 L.Ed. 455 (1875), the United States Supreme Court embraced this public purpose requirement without reference to any particular constitutional limitation. The idea that to tax for a private purpose is to take property without due process of law did not emerge until the case of Fallbrook Irrigation District v. Bradley, 164 U.S. 112, 17 S.Ct. 56 (1896). This principle did not cut short the railroad aid bond era; it was determined that the use of local unit property, funds or credit in aid of a utility enterprise, like a railroad, which was calculated to be of special benefit to the unit, was a public purpose of that unit. United States v. Baltimore and Ohio R. R. Co., 17 Wall. 322, 27 L.Ed. 597 (1873). It did, on the other hand, block direct aid to non-utility enterprise. City of Parkersburg v. Brown, 106 U.S. 487, 1 S.Ct. 442 (1883). In many states the excesses of the railroad aid bond era produced constitutional provisions broadly prohibiting aid to private enterprise whether by donation, lending of credit or investment in stock. Schuler v. Board of Education, 370 Ill. 107, 18 N.E.2d 174 (1938), involved a recent application of such a provision. some instances the limitation went no further than to require electoral approval. Cole v. LaGrange, 113 U.S. 1, 5 S.Ct. 416 (1885).

While direct aid to private enterprise has, thus, been largely curtailed, the devise is still available in some states. In Louisiana, for example, the legislature may authorize local taxes in aid of utility enterprises, subject to approval of the property-taxpaying segment of the electorate. La.Const. of 1921, Art. XIV, § 19.

(b) Advertising

Both state and local outlay to advertise the advantages of the state or community has become a commonplace. It has been decided that the power did not, in the case of a city, exist by implication from its general powers. Loeb v. City of Jacksonville, 101 Fla. 429, 134 So. 205, 79 A.L.R. 459 (1931). An express grant of the authority has been upheld as for a public purpose. Sacramento Chamber of Commerce v. Stephens, 212 Cal. 607, 299 P. 728 (1931). Atlanta Chamber of Commerce v. McRae, 174 Ga. 590, 163 S.E. 701 (1932), is distinguishable. Fulton County made outright appropriations to the Atlanta Chamber of Commerce, a freight bureau and a convention and tourist bureau. The court struck down the appropriations as unconstitutional donations to private parties. See also Stone v. State ex rel. Mobile Broadcasting Corporation, 223 Ala. 426, 136 So. 727 (1931). statutory authority for advertising by local government has been granted in many states.

(c) Employment of Private Individual to Induce Location of Industry in Community

In City of Fernandina v. State, 143 Fla. 802, 197 So. 454 (1940), it was decided not only that outlay for services in bringing about the location of a pulp and paper mill in a city by presenting its natural advantages was for a public purpose but also that it was authorized by the general welfare clause in the city charter.

(d) Tax Exemption or Favorable Tax Rates for New Industry

Although taxes may not be levied to subsidize private business an indirect subsidy in the form of property tax exemption gets by. The United States Supreme Court made it clear, in the early days of the republic, that, by contract stipulating exemption, a state could effectually abdicate its taxing power. New Jersey v. Wilson, 7 Cranch 164, 3 L.Ed. 303 (1812). Later federal and state cases fortified that decision. See Cooley, Taxation § 705 (4th ed. 1924). A state constitution may, of course, deny the legislature the power to make or authorize exemptions to industry or to make an exemption binding by contract. Some constitutions specify just what classes of property shall enjoy exemption. See Mo.Const. of 1945, Art. X, § 6; Tenn.Const., Art. II, § 28.

Several of the southern states have used tax exemptions as a lure to industry. In Alabama, where the constitution simply leaves it to the legislature to determine what property or classes of property shall be exempt, industrial exemptions have been upheld. Pullman Car & Mfg. Corporation v. Hamilton, 229 Ala. 184. 155 So. 616 (1934). Counties and municipalities are authorized by statute to grant exemptions for not to exceed ten years covering new plants and factories, or additions to or extensions of old ones, in certain industries. Code of Alabama, Title 31, § 3 et seg. (1940). Louisiana has a special constitutional provision authorizing parishes and municipalities to grant property tax exemptions to new industries and additions to old ones, but written consent of any existing similar and directly competing industry in the unit is made a condition precedent. La.Const. of 1921, Art. X, § 22. The pertinent provision of the Mississippi Constitution reads as follows:

"Section 182. The power to tax corporations and their property shall never be surrendered or abridged by any contract or grant to which the state or any political subdivision thereof may be a party, except that the legislature may grant exemption from taxation in the encouragement of manufactures and other new enterprises of public utility extending for a period of not exceeding five years, the time of such exemptions to commence from date of charter, if to a corporation; and if to an individual enter-

prise, then from the commencement of work; but when the legislature grants such exemptions for a period of five years or less, it shall be done by general laws, which shall distinctly enumerate the classes of manufactures and other new enterprises of public utility entitled to such exemptions, and shall prescribe the mode and manner in which the right to such exemptions shall be determined."

The exemption statute will be found in Miss.Code Ann. § 9703 et seq. (1942).

Whether tax exemptions for new industry is sound as a matter of policy is a highly debatable matter. The very granting of an exemption raises some doubt about the quality of revenue law and administration. Would a farsighted business man be influenced more by a short-lived exemption than the general character of tax law and tax administration in a state?

What of a classified property tax, which places industry in a favored classification? Suppose a large industrial organization provides for itself some of the services normally furnished by local government. Would that support a classification which gave the taxpayer an advantage in keeping with the burden of self-protection or service? See La.Const. Art. XIV, § 3(a).

(e) Construction of Facilities for Lease to Private Industry

It is familiar learning that local government has played an important rôle in the commercial life of the community from time immemorial. Conspicuous in medieval times were local fairs and markets. Provision of market facilities by local government came early. In the American colonial period that was a leading municipal function. Public markets, wharves and docks were, as a matter of fact, revenue mainstays of New York and other trade centers. These institutions were so much a part of the urban scheme of things that the Supreme Court of North Carolina could have experienced no difficulty in deciding that a markethouse was a necessary municipal expense. Swinson v. Town of Mount Olive, 147 N.C. 611, 61 S.E. 569 (1908).

Characteristically, these commercial facilities have been administered by letting space to private enterprise. Recently there has been experimentation in the southern states with the application of that pattern to industrial plants. The objective is to have local government encourage industrial development by building industrial plants to be let or sold to private industry. A Mississippi enabling statute of 1936, which authorized local bond issues for this purpose, was upheld in Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, 115 A.L.R. 1436 (1938). The court determined that the tax to support the bonds would be for a pub-

lic purpose and thus not violative of due process. It decided, further, that the state constitutional ban on lending credit or making appropriations to corporations was not violated. An appeal to the United States Supreme Court was dismissed for want of a substantial federal question. 303 U.S. 627, 58 S.Ct. 766 (1938). The case is discussed in Note 47 Yale L.J. 1412 (1938). It is of interest that the enabling act was repealed in 1940. Miss. Laws of 1940, c. 147.

Louisiana has authorized the device to stimulate agriculture. Section 33 of Article XIV of the Constitution of 1921 authorizes the creation of ad hoc agencies in the parishes to construct industrial plants for converting or processing farm products, which are to be operated by private enterprise under lease.

(2) Direct Governmental Entry into Industrial and Commercial Activity

Prior to Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505 (1934), public regulation in the form of a requirement of a certificate of convenience and necessity as a condition of entering an "ordinary" business or of non-utility rate or price-fixing was unlikely to be acceptable to the courts. See New State Ice Co. v. Liebmann, 285 U.S. 262, 52 S.Ct. 371 (1932). Public entry upon economic activity was another matter. So far as federal limitations were concerned almost any sort of economic activity, whether operating a fuel yard, grain elevator, bank, gasoline filling station, or what not, could be made public business. Standard Oil Co. v. City of Lincoln, 275 U.S. 504, 48 S.Ct. 155 (1927); Green v. Frazier, 253 U.S. 233, 40 S.Ct. 499 (1920); Jones v. City of Portland, 245 U.S. 217, 38 S.Ct. 112 (1917). Some of the state courts are not so liberally disposed upon the subject as was the Mississippi Court in the Albritton case, supra. See esp. Toebe v. City of Munising, 282 Mich. 1, 275 N.W. 744 (1937). The oft-cited case of Union Ice & Coal Co. v. Town of Ruston, 135 La. 898, 66 So. 260 (1914), in which it was held that an ice plant was not a municipal public purpose, should hardly be considered apart from the constitutional amendment which it provoked and which survives as Section 18 of Article XIV of the Louisiana Constitution of 1921. The section expressly authorizes municipal ice plants.

NASH v. TOWN OF TARBORO

Supreme Court of North Carolina, 1947. 227 N.C. 283, 42 S.E.2d 209.

brought this action on his own behalf and that of the other tax-payers similarly situated to restrain the municipality from issuing bonds and levying taxes for the acquisition or construction of a hotel in the town, which it proposed to own and maintain, and from the levy of taxes to retire said bonds. The plaintiff contends that the proposed action is in contravention of Article V, Section 3, of the Constitution, requiring that taxes be levied and collected only for a public purpose.

The Session Laws of 1945, Chapter 413, purports to authorize the acquisition, or construction of the hotel, the issuance of the bonds, and the levy of the tax, provided the project be approved by a majority of the qualified voters at an election to be called by the Board of Commissioners. Pursuant to the authority thus given the Board passed an ordinance providing for the issue of bonds in the sum of \$250,000 and the levy of a tax, if approved as provided in the statute. The election was duly called and held, and the result was favorable to the issuance of the bonds and the levy of the tax.

The case develops no disagreement as to the facts, or claim of procedural defects.

In its further answer the defendant pointed out that the Town of Tarboro has 8,000 inhabitants; that it contains only one hotel, out of repair and with inadequate facilities, and of such a character and reputation that those having occasion to visit the town decline to patronize it, but secure accommodations in neighboring towns. It is pointed out that by reason of this condition the general welfare and convenience of both the residents of the town and those who have business there, and the economic interests of the town have greatly suffered and will continue to be impaired if the situation is not remedied.

The matter came up for a hearing before Stevens, J., who, after making findings of fact and conclusions of law, entered a judgment sustaining the validity and constitutionality of the statute, the ordinance and the acts pursuant thereto, the proposed bond issue and the tax levy, and denied the injunction and dismissed the action. From this judgment the plaintiff appealed, assigning error.

DENNY, JUSTICE. This appeal presents only one question: Is the cost of construction, maintenance and operation of a hotel by a municipality a "public purpose", within the meaning of Article

V, Section 3, of our Constitution? The cited section provides: "Taxes shall be levied only for public purposes." It must be conceded, therefore, that the defendant is without authority to proceed with the proposed project unless the above question is answered in the affirmative. For it is settled with us beyond question, that there can be no lawful tax which is not levied for a public purpose. Briggs v. City of Raleigh, 195 N.C. 223, 141 S.E. 597: Commissioners of Johnston County v. State Treasurer, 174 N.C. 141, 93 S.E. 482, 2 A.L.R. 726; Jones v. City of Portland, 245 U.S. 217, 38 S.Ct. 112, 62 L.Ed. 252, L.R.A.1918C, 765, Ann. Cas.1918E, 660: Citizens Savings & Loan Ass'n v. City of Topeka, 20 Wall. 655, 87 U.S. 655, 22 L.Ed. 455; Haesloop v. City Council of Charleston, 123 S.C. 272, 115 S.E. 596; Burns v. Essling, 156 Minn. 171, 194 N.W. 404; State ex rel. Kansas City v. Orear, 277 Mo. 303, 210 S.W. 392; 44 C.J. 1270; 38 Amer.Jur., 85; Mc-Quillin, Municipal Corporations, Vol. 6, 2d Ed., p. 337; Cooley on Taxation, Vol. 1, 4th Ed., Sec. 174. . . . The difficulty, however, arises in deciding what is and what is not a public purpose. And, while the initial responsibility for the determination of this question rests with the legislature, its determination is not conclusive. "In its final analysis, it is a question for the courts." Briggs v. City of Raleigh, supra [195 N.C. 223, 141 S.E. 601]. Yarborough v. North Carolina Park Commission, 196 N.C. 284, 145 S.E. 563; Cobb v. Atlantic Coast Line R. Co., 172 N.C. 58, 89 S.E. 807; In re Opinion of the Justices, 118 Me. 503, 106 A. 865; Kinney v. City of Astoria, 108 Or. 514, 217 P. 840; People ex rel. Horton v. Prendergast, 220 App.Div. 351, 222 N.Y.S. 29; Id., 248 N.Y. 215, 162 N.E. 10; Cooley on Taxation, Vol. 1, Sec. 187.

In determining whether or not a tax is for a public purpose, when considered in the light of custom and usage . courts should also take into consideration the fact, that a purpose not theretofore considered public, but by reason of changed conditions and circumstances, may be so classified. Stevenson v. Port of Portland, 82 Or. 576, 162 P. 509; 61 C.J., 90. This principle has been applied in determining what is a necessary expense within the meaning of Article VII, Section 7, of our Constitution. Prior to the decision of this Court in the case of Fawcett v. Mount Airy, 1903, 134 N.C. 125, 45 S.E. 1029, 63 L.R.A. 870, 101 Am.St.Rep. 825, the expense incurred by a municipality for the purpose of building and operating plants to furnish water and lights to its citizens was not considered a necessary expense. The urgent need, however, for the establishment and maintenance of such facilities in our towns and cities, to protect the health of the citizens thereof, fully justified the judicial determination that the cost of construction and maintenance of such plants, is a necessary expense within the meaning of the Constitution. . . .

We deem it unnecessary to cite or discuss the long list of decisions of this Court, dealing with the many things which have been held to fall within the definition of a "public purpose", such as streets, sidewalks, bridges, water, light and sewerage plants, market houses, abattoirs, municipal buildings, auditoriums, hospitals, playgrounds, parks, railroads, armories, fairs and airports. Those decisions however, in our opinion, do not support the contention that the cost of constructing and maintaining a hotel by a municipality is a public purpose within the meaning of our Constitution.

It has been held, however, that a municipal corporation may operate a coal yard and may manufacture and sell ice. Jones v. City of Portland, supra; Stevenson v. Port of Portland, supra; City of Tombstone v. Macia, 30 Ariz. 218, 245 P. 677, 46 A.L.R. 828; Holton v. City of Camilla, 134 Ga. 560, 68 S.E. 472, 31 L.R. A., N.S., 116, 20 Ann. Cas. 199; Central Lumber Co. v. City of Waseca, 152 Minn. 201, 188 N.W. 275; Consumers' Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N.W. 643. It has also been held otherwise. State ex rel. Kansas City v. Orear, supra; Baker v. City of Grand Rapids, 142 Mich. 687, 106 N.W. 208; Union Ice & Coal Co. v. Town of Ruston, 135 La. 898, 66 So. 262, L.R.A.1915B, 859, Ann.Cas.1916C, 1274. But we have not been able to find any authority, and the appellees have cited none, in which it has been held that the cost of constructing and maintaining a hotel is for a public purpose. On the other hand, it seems that wherever the question has been considered, the Courts and text-book writers have held to the view, that the operation of a hotel is essentially a private business, and therefore the cost of constructing and operating a hotel would not be for a public municipal purpose. Town of Warrentown v. Warren County, 215 N.C. 342. 2 S.E.2d 463; Kennedy v. City of Nevada, supra; Lancaster v. Clayton, 86 Ky. 373, 5 S.W. 864; 116 A.L.R. 898; Haesloop v. City Council of Charleston, supra; 44 C.J. 1271.

This Court held in the case of Town of Warrenton v. Warren County, supra [215 N.C. 342, 2 S.E.2d 464], where the Town of Warrenton, pursuant to certain legislative authority, had invested a substantial sum in the construction of a local hotel, and thereafter was compelled to purchase the property in order to protect its investment, that the property was not held for a governmental purpose and was therefore subject to taxation by Warren County. Schenck, J., in speaking for the Court, said: "The property is neither held for nor used for governmental or necessary public purposes, but purely for business purposes, and in competition with any other hotel that may be established in the Town of Warranton or vicinity." In a concurring opinion, Stacy, C. J.,

said: "Counties, cities and towns are created for the benefit of the public and charged with the administration of community It was never contemplated that they should engage in competitive, private business. . . . Public funds may be expended only for a public purpose. . . . The reason municipal property is granted immunity from taxation is, that it is supposed to be dedicated to a public use."

Therefore, it is clear, that if a municipal corporation could legally tax its citizens to construct and operate a hotel, such hotel would be exempt from taxation. For we know of no authority which gives one political subdivision of a State the authority to levy and collect an ad valorem tax on property held for a public purpose, by another political subdivision of the same State. G.S. § 105-3(a); Board of Financial Control of Buncombe County v. Henderson County, 208 N.C. 569, 181 S.E. 636, 101 A.L.R. 783: Town of Benson v. Johnston County, 209 N.C. 751, 185 S.E. 6; Town of Weaverville v. Hobbs, Com'r Vets. Loan Fund, 212 N.C. 684, 194 S.E. 860: Town of Warrenton v. Warren County, supra: City of Winston-Salem v. Forsyth County, 217 N.C. 704, 9 S.E. 381.

It may be desirable for the Town of Tarboro to have additional hotel accommodations. Such facilities would, no doubt, serve a useful purpose and tend to enhance the value of property generally, as well as to promote the commercial life of the community, but ordinarily such benefits will be considered too incidental to justify the expenditure of public funds. Haesloop v. City Council of Charleston, supra; McQuillin Municipal Corporations, Vol. 6, 2d Ed., Sec. 2532, p. 343; Cooley on Taxation, Vol. 1, 4th Ed., Section 175 et seq. Every legitimate business in a community promotes the public good. Citizens Savings & Loan Ass'n v. City of Topeka, supra. But "It may be safely stated that no decision can be found sustaining taxation by a municipality, where its principal object is to promote the trade and business interests of the municipality, and the benefit to the inhabitants is merely indirect and incidental." McQuillin, Municipal Corporations, supra. "Many objects may be public in the general sense that their attainment will confer a public benefit or promote the public convenience, but not be public in the sense that the taxing power of the State may be used to accomplish them." Cooley on Taxation, supra, p. 383. Waples v. Marrast, 108 Tex. 5, 184 S.W. 180, L.R.A.1917A, 253.

We are not unmindful of the rule, however, that an Act of the Legislature will not be disturbed by the Courts, unless such Act is clearly unconstitutional. Brumley v. Baxter, supra: Bridges v. City of Charlotte, 221 N.C. 472, 20 S.E.2d 825; Freeman v. Board of Com'rs of Madison County, 217 N.C. 209, 7 S.E.2d 354;

State v. Harris, 216 N.C. 746, 6 S.E.2d 854, 128 A.L.R. 658; Briggs v. City of Raleigh, supra; Hartsfield v. City of New Bern, 186 N.C. 136, 119 S.E. 15. But when an Act of the Legislature is in conflict with a constitutional provision, it is the duty of the Court to sustain the Constitution in preference to the Act. Glenn v. Board of Education, 210 N.C. 525, 187 S.E. 781; Southern R. Co. v. Cherokee County, 177 N.C. 86, 97 S.E. 758; State ex rel. Attorney General v. Knight, 169 N.C. 333, 85 S.E. 418, L.R.A. 1915F, 898, Ann.Cas.1917D, 517; 11 Amer.Jur. 714.

We have carefully considered the question before us, in the light of the decisions and other authorities cited herein, and we are of the opinion that the cost of constructing and maintaining a hotel is not a public purpose, within the meaning of Article V, Section 3, of our Constitution. It follows, therefore, that the Legislature is without power to authorize a municipal corporation to issue its bonds and levy a tax for the payment of the principal and interest on such indebtedness, in order to enable it to obtain funds for the construction and maintenance of a municipal hotel.

The judgment of the Court below is Reversed.

SECTION 3. CONTROL OF PRIVATE PROPERTY DEVELOPMENT AND USES

A. OLD STYLE—THE NUISANCE TECHNIQUE

THE STATE v. HAINES

Supreme Judicial Court of Maine, 1849. 30 Maine 65.

SHEPLEY, C. J. The defendant was indicted with another person for keeping a bowling alley for gain and common use.

The first question presented by the bill of exceptions is, whether the offence is sufficiently set forth in the indictment. A motion was made apparently with a design to have the indictment quashed. This was overruled, and the indictment was declared to be sufficient. The presiding Judge was under no obligation to decide such a question before the accused had been found guilty. Then it could be properly presented by a motion in arrest. As such a motion can yet be made, the question may as well be considered and decided.

The indictment contains two counts. Divested of their formal and expletive language the averments in the first count are, that the accused kept a bowling alley for gain, and procured or induced persons to frequent the same to play at bowls in the day and night time, to the great annoyance, damage and common nuisance of the citizens.

An averment, that the acts alleged are to the common nuisance without averments, which, being proved, will show, that the accused had been guilty of causing a nuisance, will not be sufficient. The allegation, that the alley was kept "to the great annoyance and damage" of the citizens, without stating any particular acts that would occasion such annoyance or damage, is so general, that the accused could not be prepared to rebut the charge by proof.

The question therefore on this count is presented, whether the keeping of a bowling alley for gain and common use, as an inducement for persons to play on it in the day and night time, is a common nuisance.

A nuisance has been defined to be "any thing, that worketh hurt, inconvenience, or damage." 3 Bl. Com. 216. Erections made and occupied for certain purposes are by the law regarded as nuisances, without proof of any particular injury. The injury is considered to be inherent. Other erections wholly innoxious in their nature and usual occupation, may become nuisances by being used in such a place or in such a manner, as to render the enjoyment of life and property in their neighborhood uncomfortable. Among those, which are held to be nuisances per se are stages for rope-dancing, for mounte-banks, gaming houses and bawdy-houses. The law requires no particular allegations or proofs, that they are injurious to the community. The simple allegation, that such places or houses are kept ad commune nocumentum, is sufficient. Among those not regarded as common nuisances, without proof of their improper location or use, may be reckoned the trades of the soap-boiler, tallow-chandler, brewer and tanner. If a bowling alley kept for gain and common use is to be regarded as a common nuisance per se, the first count in the indictment is sufficient, otherwise it is not.

Hawkins states, that stages for rope-dancers, and gaming houses are common nuisances "not only because they are great temptations to idleness, but because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighborhood." Hawk. P. C. B. 1, c. 75, Secs. 6, 7.

Bowling alleys appear to have been early regarded as analogous in character to stages for rope-dancing, probably because they produced similar results. Jacob Hall's case, 1 Mod. 76. Hale, C. J. is reported to have said in that case, "that in the eighth year of Charles the first Noy came into Court and prayed

a writ to prohibit a bowling alley erected near St. Dunstan's church, and had it." It appears that a writ was issued in the case referred to by Lord Hale to abate the bowling alley as a nuisance. 1 Vent. 169.

The "hurt" or injury to the community, which has occasioned bowling allevs kept for gain and common use to be regarded as common nuisances, arises from their tendency to withdraw the young and inconsiderate from any useful employment of their time, and to subject them to various temptations. From their affording to the idle and dissolute encouragement to continue in their destructive courses. Clerks, apprentices and others are induced, not only to appropriate to them hours, which should be employed to increase their knowledge and reform their hearts. but too often to violate higher moral duties to obtain means to pay for the indulgence. Other bad habits are in such places often introduced or confirmed. The moral sense, the correct principles, the temperate, regular and industrious habits, which are the basis of a prosperous and happy community, are frequently impaired or destroyed. Bowling alleys without doubt may be resorted to by many persons without such injurious results. The inquiry is not what may be done at such places without injury to persons of fixed habits and principles, but what has been in the experience of man, their general tendency and result. The law notices the usual effect, the ordinary result of a pursuit or course of conduct, and by that decides upon its character. It need not be the necessary and inevitable result of a bowling alley kept for gain and common use, that it is thus injurious to the community, to make it a common nuisance. Mr. Justice Littledale, in the case of Rex v. Moore, 3 B. & Ad. 184. correctly said, "if it be the probable consequence of his act, he is answerable as if it were his actual object. If the experience of mankind must lead any one to expect the result, he will be answerable for it."

If these views are correct, the first count in the indictment is sufficient.

But if that count should be regarded as defective, the second would seem to be sufficient to show, that the alley was a nuisance, because it was used in such a manner as to render the enjoyment of life and property uncomfortable to those residing in its neighborhood.

It alleges, that the accused erected, continued and used a building for bowling with a bowling alley therein, near the dwelling-houses of divers citizens, to which persons are accustomed to resort to play at bowls in the day and night time, thereby occasioning great noises, damage, annoyances, and becoming and being injurious and dangerous to the comfort of

divers individuals and the public. The only essential and distinguishing allegation in this count is, that great noises were made. The mere fact of occasioning such noises in the night time, to the disturbance of the neighborhood, has been decided to be a nuisance. Rex v. Smith, Stra. 704. . . .

It is further insisted, that some greater interest than that arising out of possession and control of the property should have been required to enable the Court on conviction, to abate the alley as a nuisance according to the provisions of the statute. Chap. 164, Sec. 7.

The case cited by the counsel shows, that a tenant may be liable to indictment and conviction for such a use of property.

The Court is authorized by the statute to punish by fine only; and may cause the nuisance to be abated. It is not required to do so, when the interests of strangers to the proceedings might be improperly affected.

Exceptions overruled and case remanded.

It hardly need be added that the view that bowling alleys operated for gain are nuisances per se has long since succumbed to a more indulgent attitude toward such activities. See Note 20 A.L.R. 1482, 1496 (1922).

LEVIN v. GOODWIN

Supreme Judicial Court of Massachusetts, 1906. 191 Mass. 341, 77 N.E. 718.

LATHROP, J. The principal question in this case is whether the license granted to the defendant, under the Rev.Laws, c. 102, § 168, was a full protection to him; and we have no doubt that it was. The Legislature has seen fit to delegate to municipal authorities, except in Boston, and in Boston to the board of police, the power to grant a license to a person to keep a billiard, pool, or sippio table, or a bowling alley for hire, gain, or reward, upon such terms or conditions as they deem proper, and may revoke it at their pleasure.

There can be no doubt that the law is constitutional. Com. v. Kinsley, 133 Mass. 578. Nor can there be any doubt that a person carrying on a business may be licensed to make a noise, which but for the license would be a nuisance. In Davis v. Sawyer, 133 Mass. 289, 43 Am.Rep. 519, this court restrained by injunction the ringing of a factory bell at an early hour in the morning for the purpose of arousing its operatives, declaring it to be a private

nuisance. The Legislature then passed an act (St.1883, p. 396, c. 84) giving manufacturers and others employing workmen the right to ring bells and use whistles and gongs of such size and weight, in such manner, and at such hours, as the board of aldermen of cities and the selectmen of towns may in writing designate. The selectmen of the town where the factory was situated then gave to the manufacturer a license to ring the same bell at the hour at which he was prevented from ringing it by the injunction; and this court on a bill of review reversed its former judgment. Sawyer v. Davis, 136 Mass. 239, 49 Am. Rep. 27. It is somewhat significant that in this case the court in its opinion, among other things, refers to the statutes "establishing hospitals, stables, and bowling alleys." Sawyer v. Davis, 136 Mass. 244, 49 Am.Rep. 27. The question involved in the case before us was fully discussed in Murtha v. Lovewell, 166 Mass. 391, 44 N.E. 347, 55 Am.St.Rep. 410, and the line was sharply drawn between the liability of a person carrying on a business causing a nuisance, before and after the obtaining of the license.

In the case before us the defendant has done nothing which his license did not authorize him to do. The judge expressly found that the bowling alleys were built in the same manner that such alleys are usually constructed, and contained certain pads or cushions designed to deaden the noise caused by the dropping or rolling of the balls. The judge further found that before the filing of the bill the defendant put double windows on the side of the building next the plaintiff's house, and put burlap on the ceiling to deaden the noise; and that the alleys as run, made no more noise than would be expected from the conduct of any similar business under similar conditions.

The judge of the superior court seems to have based his finding in favor of the plaintiff upon the ground that the plaintiff would have substantial relief from further disturbance and loss if the operation of the alleys should be discontinued at night, between the hours of 10 o'clock p. m. and 6 o'clock a. m. This may be true, but the court had no authority to change the hours named in the license, or to afford the plaintiff relief so long as the conditions of the license were complied with. Nor are we of opinion that the plaintiff is aided by the finding of the judge that the operation of alleys on the second floor of a wooden building, with unplastered walls, makes much greater noise than the operation of alleys on the ground floor or basement of a building where alleys are usually built. There is nothing in the finding which shows that the defendant did not do what he had a right to do under his license; nor is there anything in the law which confines the use of bowling alleys to a plastered building, or to the ground floor or basement. While the plaintiff has suffered loss,

this does not entitle her to recover such loss from the defendant, who has acted strictly within his legal rights.

Bill dismissed.

B. TRANSITION—PUBLIC AND PRIVATE REGULATION

(1) Sanitation and Health Measures

While the legislature may make lawful a use of property which otherwise would be a public nuisance, there is a limit to which it can meet those specially affected with the short answer "damnum absque injuria." The effect on neighboring property may be so great as to constitute a taking for which compensation must be made. See Richards v. Washington Terminal Company, 233 U.S. 546, 34 S.Ct. 654 (1914).

The reports are replete with judicial assertions that local government may not declare that a nuisance which is not so in fact. The Supreme Court of Texas has laid it down that "Not even the legislature can declare that a nuisance which is not so in fact." Crossman v. City of Galveston, 112 Tex. 303, 310, 247 S.W. 810, 812 (1923). The court was concerned in that case with an ordinance which declared dilapidated buildings nuisances without requiring the presence of any additional element bearing upon the security of persons or other property or the public health or welfare. Now it may be that in a given instance the uncompensated destruction of a dilapidated building might not be justifiable under the police power alone. On the other hand, the common law of nuisances obviously does not mark the limits of legitimate governmental control of private land uses. Is there not considerable legislative leeway, within constitutional limitations, in redefining nuisance concepts or in departing from the nuisance technique? The Texas court asseveration means that the legal content of "nuisance" is ultimately a judicial question regardless of what the legislature has said. There is no magic in the term. The legislature might define, under another label, a condition deemed sufficiently opposed to the welfare of the community to warrant uncompensated abatement. The function of the courts, in passing upon the validity of the substantive measure, would be to determine whether the legislature could reasonably have deemed the method employed an appropriate means to advance a legitimate police power objective. As we shall shortly see, the Supreme Court of the United States has so conceived the judicial function in determining the application of federal constitutional limitations. When it should come to a particular application of the statute the vital problem would be whether abatement could be entrusted largely to the administrative

process. If "nuisance" vel non were always, in last resort, to be deemed a judicial question, no matter how complete the administrative scheme of notice and a hearing, as asserted in the leading case of People ex rel. Copcutt v. Board of Health of the City of Yonkers, 140 N.Y. 1, 35 N.E. 320 (1893), the utility of the administrative process in this area of social control would be severely limited.

HADACHECK v. SEBASTIAN

Supreme Court of the United States, 1918. 239 U.S. 394, 36 S.Ct. 143.

MR. JUSTICE MCKENNA delivered the opinion of the court:

Habeas corpus prosecuted in the supreme court of the state of California for the discharge of plaintiff in error from the custody of defendant in error, chief of police of the city of Los Angeles.

Plaintiff in error, to whom we shall refer as petitioner, was convicted of a misdemeanor for the violation of an ordinance of the city of Los Angeles which makes it unlawful for any person to establish or operate a brickyard or brickkiln, or any establishment, factory, or place for the manufacture or burning of brick within described limits in the city. Sentence was pronounced against him and he was committed to the custody of defendant in error as chief of police of the city of Los Angeles.

Being so in custody he filed a petition in the supreme court of the state for a writ of habeas corpus. The writ was issued. Subsequently defendant in error made a return thereto, supported by affidavits, to which petitioner made sworn reply. The court rendered judgment discharging the writ and remanding petitioner to custody. The chief justice of the court then granted this writ of error.

The petition sets forth the reason for resorting to habeas corpus and that petitioner is the owner of a tract of land within the limits described in the ordinance, upon which tract of land there is a very valuable bed of clay, of great value for the manufacture of brick of a fine quality, worth to him not less than \$100,000 per acre, or about \$800,000 for the entire tract for brickmaking purposes, and not exceeding \$60,000 for residential purposes, or for any purpose other than the manufacture of brick. That he has made excavations of considerable depth and covering a very large area of the property, and that on account there-of the land cannot be utilized for residential purposes or any purpose other than that for which it is now used. That he purchased the land because of such bed of clay and for the purpose of manufacturing brick; that it was, at the time of purchase,

outside of the limits of the city, and distant from dwellings and other habitations, and that he did not expect or believe, nor did other owners of property in the vicinity expect or believe, that the territory would be annexed to the city. That he has erected expensive machinery for the manufacture of bricks of fine quality which have been and are being used for building purposes in and about the city.

That if the ordinance be declared valid, he will be compelled to entirely abandon his business and will be deprived of the use of his property.

That the manufacture of brick must necessarily be carried on where suitable clay is found, and the clay cannot be transported to some other location; and, besides, the clay upon his property is particularly fine, and clay of as good quality cannot be found in any other place within the city where the same can be utilized for the manufacture of brick. That within the prohibited district there is one other brickyard besides that of plaintiff in error.

That there is no reason for the prohibition of the business; that its maintenance cannot be and is not in the nature of a nuisance as defined in § 3479 of the Civil Code of the state, and cannot be dangerous or detrimental to health or the morals or safety or peace or welfare or convenience of the people of the district or city.

That the business is so conducted as not to be in any way or degree a nuisance; no noises arise therefrom, and no noxious odors, and that by the use of certain means (which are described) provided and the situation of the brickyard an extremely small amount of smoke is emitted from any kiln, and what is emitted is so dissipated that it is not a nuisance nor in any manner detrimental to health or comfort. That during the seven years which the brickyard has been conducted no complaint has been made of it, and no attempt has ever been made to regulate it.

That the city embraces 107.62 square miles in area and 75 per cent of it is devoted to residential purposes; that the district described in the ordinance includes only about 3 square miles, is sparsely settled, and contains large tracts of unsubdivided and unoccupied land; and that the boundaries of the district were determined for the sole and specific purpose of prohibiting and suppressing the business of petitioner and that of the other brickyard.

That there are and were, at the time of the adoption of the ordinance, in other districts of the city thickly built up with residences brickyards maintained more detrimental to the inhabitants of the city. That a petition was filed, signed by several hundred persons, representing such brickyards to be a nuisance, and

no ordinance or regulation was passed in regard to such petition, and the brickyards are operated without hindrance or molestation. That other brickyards are permitted to be maintained without prohibition or regulation.

That no ordinance or regulation of any kind has been passed at any time regulating or attempting to regulate brickyards, or inquiry made whether they could be maintained without being a nuisance or detrimental to health. . . .

But there are substantial traverses made by the return to the writ, among others, a denial of the charge that the ordinance was arbitrarily directed against the business of the petitioner, and it is alleged that there is another district in which brickyards are prohibited.

There was a denial of the allegations that the brickyard was conducted or could be conducted sanitarily, or was not offensive to health. And there were affidavits supporting the denials. In these it was alleged that the fumes, gases, smoke, soot, steam, and dust arising from petitioner's brickmaking plant have from time to time caused sickness and serious discomfort to those living in the vicinity.

There was no specific denial of the value of the property, or that it contained deposits of clay, or that the latter could not be removed and manufactured into brick elsewhere. There was, however, a general denial that the enforcement of the ordinance would "entirely deprive petitioner of his property and the use thereof." . . .

The court considered the business one which could be regulated, and that regulation was not precluded by the fact "that the value of investments made in the business prior to any legislative action will be greatly diminished," and that no complaint could be based upon the fact that petitioner had been carrying on the trade in that locality for a long period.

And, considering the allegations of the petition, the denials of the return, and the evidence of the affidavits, the court said that the latter tended to show that the district created has become primarily a residential section, and that the occupants of the neighboring dwellings are seriously incommoded by the operations of petitioner; and that such evidence, "when taken in connection with the presumptions in favor of the propriety of the legislative determination, is certainly sufficient to overcome any contention that the prohibition [of the ordinance] was a mere arbitrary invasion of private right, not supported by any tenable belief that the continuance of the business . . . was so detrimental to the interests of others as to require suppression."

There must be progress, and if in its march private interests are in the way, they must yield to the good of the community. The logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground, and that if it grows at all it can only grow as the environment of the occupations that are usually banished to the purlieus.

The police power and to what extent it may be exerted we have recently illustrated in Reinman v. Little Rock, 237 U.S. 171, 59 L.Ed. 900, 35 S.Ct. 511. The circumstances of the case were very much like those of the case at bar, and give reply to the contentions of petitioner, especially that which asserts that a necessary and lawful occupation that is not a nuisance per se cannot be made so by legislative declaration. There was a like investment in property, encouraged by the then conditions; a like reduction of value and deprivation of property was asserted against the validity of the ordinance there considered; a like assertion of an arbitrary exercise of the power of prohibition. Against all of these contentions, and causing the rejection of them all, was adduced the police power. There was a prohibition of a business, lawful in itself, there as here. It was a livery stable there; a brickyard here. They differ in particulars, but they are alike in that which cause and justify prohibition in defined localities,—that is, the effect upon the health and comfort of the community.

The ordinance passed upon prohibited the conduct of the business within a certain defined area in Little Rock, Arkansas. This court said of it: granting that the business was not a nuisance per se, it was clearly within the police power of the state to regulate it, "and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law." And the only limitation upon the power was stated to be that the power could not be exerted arbitrarily or with unjust discrimination. There was a citation of cases. We think the present case is within the ruling thus declared.

There is a distinction between Reinman v. Little Rock and the case at bar. There a particular business was prohibited which was not affixed to or dependent upon its locality; it could be conducted elsewhere. Here, it is contended, the latter condition does not exist, and it is alleged that the manufacture of brick must necessarily be carried on where suitable clay is found, and that the clay on petitioner's property cannot be transported to some other locality. This is not urged as a physical impossibility, but only, counsel say, that such transportation and the transportation of the bricks to places where they could be used in con-

struction work would be prohibitive "from a financial standpoint." But upon the evidence the supreme court considered the case, as we understand its opinion, from the standpoint of the offensive effects of the operation of a brickyard, and not from the deprivation of the deposits of clay, and distinguished Ex parte Kelso, 147 Cal. 609, 2 L.R.A., N.S., 796, 109 Am.St.Rep. 178, 82 P. 241, wherein the court declared invalid an ordinance absolutely prohibiting the maintenance or operation of a rock or stone quarry within a certain portion of the city and county of San Francisco. The court there said that the effect of the ordinance was "to absolutely deprive the owners of real property within such limits of a valuable right incident to their ownership, viz., the right to extract therefrom such rock and stone as they may find it to their advantage to dispose of." The court expressed the view that the removal could be regulated, but that "an absolute prohibition of such removal under the circumstances" could not be upheld.

In the present case there is no prohibition of the removal of the brick clay; only a prohibition within the designated locality of its manufacture into bricks. And to this feature of the ordinance our opinion is addressed. Whether other questions would arise if the ordinance were broader, and opinion on such questions, we reserve.

Petitioner invokes the equal protection clause of the Constitution and charges that it is violated in that the ordinance (1) "prohibits him from manufacturing brick upon his property while his competitors are permitted, without regulation of any kind, to manufacture brick upon property situated in all respects similarly to that of plaintiff in error;" and (2) that it "prohibits the conduct of his business while it permits the maintenance within the same district of any other kind of business, no matter how objectionable the same may be, either in its nature or in the manner in which it is conducted."

If we should grant that the first specification shows a violation of classification, that is, a distinction between businesses which was not within the legislative power, petitioner's contention encounters the objection that it depends upon an inquiry of fact which the record does not enable us to determine. It is alleged in the return to the petition that brickmaking is prohibited in one other district, and an ordinance is referred to regulating business in other districts. To this plaintiff in error replied that the ordinance attempts to prohibit the operation of certain businesses having mechanical power, and does not prohibit the maintenance of any business or the operation of any machine that is operated by animal power. In other words, petitioner makes his contention depend upon disputable considerations of classification and

upon a comparison of conditions of which there is no means of judicial determination, and upon which, nevertheless, we are expected to reverse legislative action exercised upon matters of which the city has control.

To a certain extent the latter comment may be applied to other contentions; and, besides, there is no allegation or proof of other objectionable businesses being permitted within the district, and a speculation of their establishment or conduct at some future time is too remote. . . .

It may be that brickyards in other localities within the city where the same conditions exist are not regulated or prohibited, but it does not follow that they will not be. That petitioner's business was first in time to be prohibited does not make its prohibition unlawful. And it may be, as said by the supreme court of the state, that the conditions justify a distinction. However, the inquiries thus suggested are outside of our province. . . .

Judgment affirmed.

BALLENTINE v. NESTER

Supreme Court of Missouri, 1942. 350 Mo. 58, 164 S.W.2d 378.

Tipton, Judge. Habeas corpus. On January 28, 1942, the petioner was convicted in the St. Louis City Court for violating Section 5340 of St. Louis City Ordinance 41804 (being an ordinance amending Article 36 of Chapter 34, Revised Code, City of St. Louis, 1936, Ordinance 40999, as amended by Ordinances 41302, 41558, and 41604) relating to the Division of Smoke Regulation, and he was fined the sum of \$100 and costs. The petitioner refused to pay the fine, and he was thereupon ordered into the custody of Thomas Nester, City Marshal of the City of St. Louis, in accordance with an order of execution, detention, and judgment issued by that court.

Thereafter, he filed in this court a petition for a writ of habeas corpus, in which he attacks the validity of that ordinance for the reasons that it conflicts with the provisions of the 14th Amendment of the Constitution of the United States; Article II, Section 30, and Article III, Section 1, Article IV, Section 53, Subsections (26) and (32) of our State Constitution, Mo.R.S.A.; Sections 6540, 7442, and 14619, Revised Statutes of Missouri, Mo.R.S.A. §§ 6540, 7442, 14619; and Article IV, Section 2, and Article XIII, Section 14, Subsection (a) of the St. Louis City Charter.

Section 5340 of the Ordinance above referred to reads as follows:

"Section 5340. Importation, Sale, Use or Consumption of Certain Coals Prohibited. It shall be unlawful to import, sell, offer for sale, expose for sale, exchange, deliver or transport for use and consumption in the City of St. Louis, or to use or consume in the City of St. Louis, any coal in sizes which will pass through a two inch circular opening or its equivalent, which contains in excess of twelve per cent ash or two per cent sulphur on a dry basis, unless such coal, before importation or sale in the City of St. Louis has been cleaned by a process known as washing, so that when said coal is so washed it shall contain no more than twelve per cent ash on a dry basis: and such coal can only be used or consumed in approved mechanical fuel-burning equipment; provided the provisions of this section shall not apply to any coal with a volatile content of less than 23 per cent on a dry basis. The term 'washing,' as used in this section, is meant to include purifying, cleaning or removing impurities by mechanical processes of removing refuse from coal, regardless of the cleaning medium used. (a) It shall be unlawful to import, sell, offer for sale, expose for sale, exchange, deliver, or transport for use and consumption in the City of St. Louis, or to use or consume in the City of St. Louis any solid fuel for hand-firing or surface burning types of equipment which does not meet the standard of a smokeless solid fuel as set forth in this section. (b) Smokeless solid fuel for the purpose of the enforcement of this ordinance shall be considered a fuel the volatile content of which is 23 per cent or less on a dry basis. Provided, however, that if a fuel contains volatile matter in excess of 23 per cent on a dry basis, it shall be acceptable under the terms of this ordinance provided that it meets the same standards in regard to smoke production as that of a fuel containing less than 23 per cent volatile matter on a dry basis, and subject to the following conditions in order to ascertain whether or not such standards are met: (1) Complete plans and specifications of such process must be submitted to the Commissioner of Smoke Regulation, and from time to time any additional information he may reasonably require regarding the product. (2) An adequate supply of the finished product must be made available to the Commissioner of Smoke Regulation to conduct whatever tests he deems necessary to establish its value as a smokeless solid fuel. (3) Any person, firm or corporation whose product is submitted to such tests must pay in advance all expenses necessary to the attendant tests. The Commissioner of Smoke Regulation shall be authorized to publish a list of brands or trade names of smokeless solid fuels as defined under this section, and to compile and publish from time to time statistics in reference to the supply, prevailing prices and other pertinent facts for the guidance of the public."

The information under which the petitioner was convicted charges the petitioner as follows: "In this to-wit: In the City of St. Louis, and State of Missouri, on the 26th day of January, 1942, the said Bruce Ross Ballentine did then and there, to wit: use and consume, import, sell, offer for sale, expose for sale, exchange, deliver and transport for use and consumption in the City of St. Louis and to be used and consumed in said City, solid fuel for hand-firing equipment, said fuel having a volatile content in excess of 23 per cent on a dry basis and not acceptable under the standards in regard to smoke production as that of a fuel containing less than 23 per cent volatile matter on a dry basis and not subject to the conditions to ascertain whether or not such standards were met as provided in said sections and Ordinance. Contrary to the Ordinance in such cases made and provided." . . .

Petitioner contends that the ordinance is not and cannot be a bona fide health regulation because it does not regulate noxious or deleterious gases that are given off in the burning of coal and the injury that results to the individual who breathes these gases depends upon the chemical components of the substance burned and not on the manner of burning the coal. It is true the Ordinance makes only the emission of dense smoke unlawful: it contains no provision that tends to regulate or prevent the discharge of deleterious gases into the air. The legislative authorities may classify with reference to an evil to be prevented. and legislation designed to prevent one evil is not void because it does not prevent another. "It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named." Patsone v. Pennsylvania, 232 U.S. 138, loc. cit. 144, 34 S.Ct. 281, loc. cit. 282, 58 L.Ed. 539, quoted with approval in Blind v. Brockman, 321 Mo. 58, 12 S.W.2d 742. A lawmaking body "may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed." Central Lumber Company v. South Dakota, 226 U.S. 157, loc, cit, 161, 33 S.Ct. 66, loc. cit. 67, 57 L.Ed. 164. We hold that the fact the ordinance does not regulate deleterious gases that are emitted into the air does not invalidate it.

While we do not understand that the petitioner claims the City of St. Louis is without power to pass an ordinance to abate dense smoke, he does contend that this particular ordinance is void. He makes the point that "an ordinance which, without statutory authority, divides bituminous coal into five (5) classes and definitely and distinctly prohibits the use of and all traffic

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in coal of certain sizes, kinds or qualities is not valid, for it is the settled law of this State that a municipal corporation has no power by ordinance to declare that to be a nuisance which is not such in fact, or to suppress in part or in toto any business within its limits which is not a nuisance per se."

The City of St. Louis is a municipal corporation and can exercise only such "powers as have been specifically conferred on it by special charter or general law, and in either express terms or by reasonable implication." See Arkansas-Missouri Power Corporation v. City of Kennett, 348 Mo. 1108, 156 S.W.2d 913, and cases cited therein.

Our state legislature has declared that in all cities having over 100,000 inhabitants, "The emission or discharge into the open air of dense smoke within the corporate limits of any city of this state is hereby declared to be a public nuisance." Section 7575, R.S.Mo.1939, Mo.R.S.A. § 7575. While Section 7576 provides that "all cities to which the provisions of the preceding section are applicable are hereby empowered to enact all necessary or desirable ordinances, not inconsistent with the provisions herein, nor the Constitution, nor any general law of this state, in order to carry out the provisions of said section." The City of St. Louis has over 100,000 inhabitants, and, therefore, it has the power to enact ordinances to abate the public nuisance of having dense smoke discharged into the open air within its corporate limits. It is to be noted that the above sections do not state the method or details of exercising this power granted to the cities to which these sections are applicable. "... the rule is firmly established that where there is an express grant to a city without the method or details of exercising such power prescribed. the City Council has authority to exercise the power granted it in any reasonable and proper manner. State ex rel. City of Memphis v. Hackman, 273 Mo. 670, 202 S.W. 7." Dodds v. Kansas City, 347 Mo. 1193, 152 S.W.2d 128, loc. cit. 131; Arkansas-Missouri Power Corporation v. City of Kennett, supra. There can be no doubt that under the above sections that the legislative department of the City of St. Louis has the power to abate the smoke nuisance in the city by any reasonable method. To accomplish that object, it enacted Section 5340, supra. This section sought to obtain that object by regulating the kind of coal that can be burned in that city. That is, by dividing bituminous coal into five classes, regulating the sizes, kinds, and qualities of coal that can be used, and the types of furnaces in which certain coals may be burned. "That the smoke nuisance is directly contributed to and almost wholly caused by burning of soft or bituminous coal is a matter of general knowledge, . . . Ordinary soft coal contains from 32 to 40 per cent. of volatile matter. Dense

smoke is caused by the volatile matter in the coal being distilled without being burned, and the tendency of coal to produce dense smoke depends on the amount of volatile matter in the coal. 'Smokeless coal' is a trade or commercial term applied to a grade of soft coal in which the volatile matter runs from 16 to 21 per State v. Chicago, M. & St. P. Ry. Co., 114 Minn. 122, 130 N.W. 545, loc. cit. 547, 33 L.R.A., N.S., 494, Ann. Cas. 1912B, 1030. The public policy or wisdom of a regulation in regard to the use of soft coal is for the legislature to determine and not the courts. Our state legislature, by Section 7576, supra, has granted the city power to abate dense smoke that it has declared by Section 7575, supra, to be a public nuisance. See State v. Tower, 185 Mo. 79, 84 S.W. 10, 68 L.R.A. 402. In Nelson v. City of Minneapolis, 112 Minn. 16, 127 N.W. 445, 447, 29 L.R.A., N.S., 260, it is said: "The methods, regulations, and restrictions to be imposed to attain so far as may be, results consistent with the public welfare, are purely of legislative cognizance. The courts have no power to determine the merits of conflicting theories. nor to declare that a particular method of advancing and protecting the public is superior or likely to insure greater safety or better protection than others. The legislative determination of the methods, restrictions, and regulations is final, except when so arbitrary as to be violative of the constitutional rights of the citizens."

From what we have just said, it follows that the City of St. Louis has been granted the power under Section 7575 and 7576 to pass the ordinance in question, and it is a valid regulation of the dense smoke nuisance, unless it violates some statutory or constitutional provision which we will later discuss. Having determined that the city has the power to enact an ordinance to regulate the dense smoke nuisance under the above sections of our state laws, it will be unnecessary to determine if it has such power under its charter.

Petitioner claims that the ordinance "is class legislation in that it arbitrarily distinguishes between the kinds of apparatus in which coal may be burned and grants to the operators of one kind of apparatus the privileges of using grades of coal, the use of which is denied to those possessing other and different kinds of apparatus."

Petitioner was convicted of using coal having a volatile content in excess of 23 per cent on a dry basis in hand firing equipment in violation of Section 5340, supra, while under this ordinance the same coal mechanically fired would be lawful; therefore, petitioner contends that the ordinance is void because it arbitrarily creates classes of bituminous coal. [There are other classifications of coal under this section.]

Is Section 5340, supra, void because it arbitrarily creates classes of bituminous coal that may be used under certain conditions within the limits of the City of St. Louis?

"A classification for legislative purposes must rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed. It cannot be an arbitrary classification. The Legislature may pass laws applicable to a particular class of individuals, but such laws must bear equally upon all individuals coming naturally within the class. The Legislature may not classify by characteristics or qualities which might distinguish individuals unless that distinction applies to the particular matter under consideration." Ex parte French, 315 Mo. 75, loc. cit. 83, 285 S.W. 513, loc. cit. 515, 47 A.L.R. 688.

The state legislature has declared that the discharge of dense smoke in the City of St. Louis to be a nuisance per se. State v. Tower, supra. This ordinance was enacted to prevent that nuisance and not to punish the maintenance of the nuisance.

Coal burned mechanically tends to create less smoke than the same coal burned by hand. Coal burned mechanically is distributed evenly in the fire box of the furnace and would tend to produce less smoke than coal that is distributed unevenly by hand, and this is true even if firing by hand is carefully performed. Since there is a reasonable classification between how the same coal is burned, and it applies equally and uniformly to all coal users in the City of St. Louis, we cannot say that it is an arbitrary classification.

Our view is supported by the case of State v. Chicago, M. & St. P. Ry. Co., supra, 130 N.W. loc. cit. 550, wherein it is said: "Legislation designed to prevent a smoke nuisance, to be equal and uniform, need not apply alike to 'all soft coal users,' without regard to the widely different conditions, related to the resulting smoke, surrounding such use by different users. The proper basis of the classification adopted by the Legislature is the relationship of burning soft coal in the different kinds of plants to the smoke nuisance."

We hold that as Section 5340, supra, classified coal to be used according to its ash, sulphur, and volatile contents, and the type of furnace in which these various classifications of coal may be burned bears a reasonable relation to the dense smoke nuisance, the ordinance is not an arbitrary classification as it applies equally to all users of coal of the same classification.

The next point raised by the petitioner in his brief is (a) that the ordinance requires the user of coal to analyze its contents before he can purchase the coal, and (b) that a seller of coal must know before he sells coal that the purchaser has a proper furnace to burn the particular coal sold, and, therefore, the ordinance is unreasonable and void.

The petitioner goes on to state instances where an innocent purchaser may unwittingly have purchased coal not acceptable under the prescribed standards, and where the seller may have innocently sold coal to a customer who did not have a furnace acceptable under the prescribed standards. The record does not present any such questions. When the petitioner is charged with an offense innocently committed under the hypothesized circumstance or that when charged with violating Section 5340, supra, that his defense is that he innocently violated this section will be the appropriate time to deal with these academic questions.

However, we cannot help but call attention to that part of Section 5340, supra, which reads: "The commissioner of smoke regulation shall be authorized to publish a list of brands or trade names of smokeless solid fuels as defined under this section, and to compile and publish from time to time statistics in reference to the supply, prevailing prices and other pertinent facts for the guidance of the public."

Petitioner's fourth point as stated in his brief is as follows: "(a-b) Nowhere in the statutes, Sections 7575 and 7576, R.S.Mo. 1939 [Mo.R.S.A. §§ 7575, 7576], which authorizes the city to legislate in matters relating to dense smoke, or in the charter, is the power granted to the city assembly to arbitrarily outlaw the use of coal of any particular grade, size or quality. On the contrary, the provisions of Section 14619, R.S.Mo.1939 [Mo.R.S. A. § 14619], expressly require the use of Missouri coal, by Missouri institutions of the kind located in St. Louis under stated conditions" We have just ruled that the city under its police power may classify coal to be used according to its ash, sulphur, and volatile contents, and that this classification bears a reasonable relation to the dense smoke nuisance referred to in Sections 7575 and 7576, supra, and that as these sections do not prescribe the methods or details as to how to abate the smoke nuisance, the city has the right to use any reasonable method to attain the desired result.

Nor do we think this section, in regulating the use of coal, violates the due process and the equal protection of the 14th Amendment of the Federal Constitution. In passing upon a somewhat similar ordinance, in the case of Northwestern Laundry v. Des Moines, 239 U.S. 486, 36 S.Ct. 206, loc. cit. 208, 60 L.Ed. 396, loc. cit. 401, the Supreme Court of the United States said:

"So far as the Federal Constitution is concerned, we have no doubt the state may by itself, or through authorized municipalities, declare the emission of dense smoke in cities or populous neighborhoods a nuisance and subject to restraint as such; and that the harshness of such legislation, or its effect upon business interests, short of merely arbitrary enactment, are not valid constitutional objections. Nor is there any valid Federal constitutional objection in the fact that the regulation may require the discontinuance of the use of property, or subject the occupant to large expense in complying with the terms of the law or ordinance."

For the reasons above stated, it follows that the petitioner should be remanded to the City Marshal of the City of St. Louis. It is so ordered.

(2) Public Safety—Building Regulation

It is a commonplace that power to regulate various subjects and activities has freely been devolved upon one or more types of general-function units of local government. We will focus here upon building regulation because of its nexus with planning and zoning.

Certain phases of the regulation of building design, construction, alteration and repair, in the interest of public health and safety, are quite commonly covered by statute. The New York Multiple Dwelling Law is illustrative. Perhaps places of public assembly are as good examples as any of the types of structures with respect to which state-wide regulation of building is clearly appropriate. Thus, the state building code in Ohio applies only to theatres and assembly halls and to school buildings. Ohio Gen. Code § 12600-1 (Page, 1937). The Wisconsin code is broader; it applies to all buildings for commercial, industrial and public use. Wis.Stat. § 101.01 et seq. (1945) and Order 5003, Wisconsin State Building Code (1942). See also P. S. Habermann and J. W. Hofeldt, "The Wisconsin State Building Code" 1947 Wis. L.Rev. 372.

For the most part building code enactment and administration has been a province of local government, principally of the municipalities. This, of course, permits of local variations but that is hardly as strong a ground for local autonomy as administrative considerations. Theoretically the subject could be covered at the state level. Wisconsin has demonstrated that by delegation of code-making to an administrative agency a high degree of flexibility can be attained. Habermann and Hofeldt, op. cit. supra. It would be quite a problem, however, for a state

agency to administer a code as to all types of construction in every nook and cranny of the commonwealth. It is necessary, too, that building code and local zoning administration be correlated.

Legal requirements as to the publication of ordinances render the adoption of a lengthy building code so expensive that the burden might be insupportable in some communities. There are a number of private organizations, such as the National Board of Fire Underwriters, which have done a great deal of technical work in developing standard building codes and whose efforts tend toward code standardization on a regional or national scale. These factors have contributed to the emergence of a body of opinion favoring local adoption, by reference, of the provisions of so-called model or standard building codes. In the absence of enabling legislation this procedure may be subject to attack as unauthorized or violative of publication requirements. Cawley v. Northern Waste Co., 239 Mass. 540, 132 N.E. 365 (1921); State v. Waller, 143 Ohio St. 409, 55 N.E.2d 654 (1944). Enabling legislation already exists in a number of states.

There is always the possibility in public regulation that the economic group being regulated will so influence the regulatory process as to pervert it to their special advantage at the expense of the public interest. This danger is obvious in the field of building regulation.

It should be noted that in the adoption of a code by reference plain identification of the matter being adopted would be necessary. An attempt, moreover, presently to adopt future changes in a standard or model would involve a delegation of legislative power to private persons or agencies. The proper procedure would be to adopt a certain publication or edition of the standard or model and later to adopt, if desired, any change or revision after it was made.

The City of Atlanta, Georgia, in 1945, adopted by reference the 1943 edition of the building code recommended by the National Board of Fire Underwriters. In Berry v. City of Atlanta, 75 Ga.App. 278, 43 S.E.2d 191 (1947), the Court of Appeals decided that the re-roofing of a house constituted repairs, not alterations, and, thus, fell within an express exception to the requirement of a building permit.

Building codes have been much criticized of late. A principal count of the critics has been that the codes are antiquated and, thus, bar the use of new materials and methods. The codedraftsman must have reliable reference standards both of quality for materials and of good practice in design and installation of materials. Both public and private agencies have contributed

through use of laboratory research and practical experience to the development of a growing number of standards. It is the problem of the authority adopting a code to get standards effectively articulated in the code and to provide flexibility with respect to new or changing standards. G. N. Thompson, "The Problem of Building Code Improvement" 12 Law and Contemp. Prob. 95 (1947). Mr. Thompson subjects criticisms of existing codes to a considerable discount.

QUEENSIDE HILLS REALTY CO., Inc., v. SAXL

Supreme Court of the United States, 1946. 328 U.S. 80, 66 S.Ct. 850.

Mr. Justice Douglas delivered the opinion of the Court.

In 1940 appellant constructed a four story building on the Bowery in New York City and since that time has operated it as a lodging house. It was constructed so as to comply with all the laws applicable to such lodging houses and in force at that time. New York amended its Multiple Dwelling Law ¹⁵ in 1944, ¹⁶ providing, inter alia, that lodging houses "of non-fireproof construction existing prior to the enactment of this subdivision" ¹⁷ should comply with certain new requirements. ¹⁸ Among these was the installation of an automatic wet pipe sprinkler system. Appellant received notice to comply with the new requirements and thereupon instituted this suit in the New York courts for a declaratory judgment holding these provisions of the 1944 law unconstitutional and restraining their enforcement.

The bill alleged that the building was safe for occupancy as a lodging house and did not constitute a fire hazard or a danger to the occupants; that it complied with all building laws and regulations at the time of its construction; that part of it was fireproof and that the rest was so constructed as not to be dangerous to occupants; that the regulations existing prior to 1944 were adequate and sufficient to prevent loss of life in lodging houses of this particular type. It was further alleged that this lodging house has a market value of about \$25,000, that the cost of complying with the 1944 law would be about \$7,500; and that the benefits to be obtained by the changes were negligible. By reason of those circumstances the 1944 law was alleged to violate the due process clause of the Fourteenth Amendment. It was also alleged to violate the equal protection clause of the Fourteenth Amendment since it was applicable to lodging houses "existing"

^{15 [}Footnotes renumbered.] Laws 1929, c. 713; Consol.Laws, c. 61A.

¹⁶ Laws 1944, c. 553.

¹⁷ Id., Sec. 4.

¹⁸ This followed a disastrous fire in an old lodging house in New York City in which there was a considerable loss of life.

prior to the 1944 law but not to identical structures erected thereafter. Appellee answered, denying the material allegations of the bill, and moved to dismiss. The Supreme Court granted the motion. The Appellate Division affirmed without opinion. 269 App.Div. 691, 54 N.Y.S.2d 394. On appeal to the Court of Appeals the judgment was likewise affirmed without opinion. 294 N.Y. 917, 63 N.E.2d 116. The case is here on appeal, the Court of Appeals having certified by its remittitur that questions involving the Fourteenth Amendment were presented and necessarily passed upon. 295 N.Y. 567, 64 N.E.2d 278.

Little need be said on the due process question. We are not concerned with the wisdom of this legislation or the need for it. Olsen v. Nebraska, 313 U.S. 236, 246, 61 S.Ct. 862, 85 L.Ed. 1305, 1309, 133 A.L.R. 1500. Protection of the safety of persons is one of the traditional uses of the police power of the States. Experts may differ as to the most appropriate way of dealing with fire hazards in lodging houses. Appellant, indeed, says that its building, far from being a fire-trap, is largely fireproof; and to the extent that any fire hazards exist, they are adequately safeguarded by a fire alarm system, constant watchmen service, and other safety arrangements. But the legislature may choose not to take the chance that human life will be lost in lodging house fires and adopt the most conservative course which science and engineering offer. It is for the legislature to decide what regulations are needed to reduce fire hazards to the minimum. Many types of social legislation diminish the value of the property which is regulated. The extreme cases are those where in the interest of the public safety or welfare the owner is prohibited from using his property. Reinman v. Little Rock, 237 U.S. 171, 35 S.Ct. 511, 59 L.Ed. 900; Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348, Ann. Cas.1917B, 927; Pierce Oil Corp. v. Hope, 248 U.S. 498, 39 S.Ct. 172, 63 L.Ed. 381. We are dealing here with a less drastic measure. But in no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws. Hadacheck v. Sebastian, supra (239 U.S. p. 410, 36 S.Ct. 143, 60 L.Ed. 356, Ann. Cas. 1917B, 927). And see Chicago, B. & Q. R. Co. v. Nebraska, 170 U.S. 57, 18 S.Ct. 513, 42 L.Ed. 948; Hutchinson v. Valdosta, 227 U.S. 303, 33 S.Ct. 290, 57 L.Ed. 520. The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights. Block v. Hirsh, 256 U.S. 135, 155, 41 S.Ct. 458, 65 L.Ed. 865, 870, 16 A.L.R. 165. And see Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531, 34 S.Ct. 359, 58 L.Ed. 713. Appellant may have a lodging house far less hazardous than the other existing structures regulated by the 1944 law. Yet a statute may be sustained though some of the objects affected by it may be

wholly innocent. Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192, 204, 33 S.Ct. 44, 57 L.Ed. 184, 188. The question of validity turns on the power of the legislature to deal with the prescribed class. That power plainly exists here.

Appellant's claim of lack of equal protection is based on the following argument: The 1944 law applies only to existing lodging houses; if a new lodging house were erected or if an existing building were converted into a lodging house, the 1944 law would be inapplicable. An exact duplicate of appellant's building, if constructed today, would not be under the 1944 law and hence could be lawfully operated without the installation of a wet pipe sprinkler system. That is said to be a denial of equal protection of the laws.

The difficulty is that appellant has not shown that there are in existence lodging houses of that category which will escape the law. The argument is based on an anticipation that there may come into existence a like or identical class of lodging houses which will be treated less harshly. But so long as that class is not in existence, no showing of lack of equal protection can possibly be made. For under those circumstances the burden which is on one who challenges the constitutionality of a law could not be satisfied. Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580, 584, 55 S.Ct. 538, 79 L.Ed. 1070, 1072. The legislature is entitled to hit the evil that exists. Patsone v. Pennsylvania, 232 U.S. 138, 144, 34 S.Ct. 281, 58 L.Ed. 539, 543; New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 49 S.Ct. 61, 73 L.Ed. 184, 62 A.L.R. 785; Bain Peanut Co. v. Pinson, 282 U.S. 499, 51 S.Ct. 228, 75 L.Ed. 482. It need not take account of new and hypothetical inequalities that may come into existence as time passes or as conditions change. So far as we know, the 1944 law may have been designed as a stop-gap measure to take care of a pressing need until more comprehensive legislation could be prepared. common knowledge that due to war conditions there has been little construction in this field in recent years. By the time new lodging houses appear they, too, may be placed under the 1944 law; or different legislation may be adopted to take care both of the old and the new on the basis of parity. Or stricter standards for new lodging houses may be adopted. In any such case the asserted discrimination would have turned out to be fanciful, not real. The point is that lack of equal protection is found in the actual existence of an invidious discrimination (Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131, L.R.A.1916D, 545, Ann.Cas. 1917B, 283; Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655, not in the mere possibility that there will be like or similar cases which will be treated more leniently.

Affirmed.

MR. JUSTICE RUTLEDGE concurs in the result.

Mr. Justice Jackson took no part in the consideration or decision of this case.

LOWER MERION TOWNSHIP v. GALLUP

Superior Court of Pennsylvania, 1946. 158 Pa.Super. 572, 46 A.2d 35. Appeal dismissed, 329 U.S. 669, 67 S.Ct. 92.

ARNOLD, JUDGE. This case involves the validity of a building code ordinance, as it is applied to house trailers.

This Court held in Township of Lower Merion v. Harrison, 84 Pa.Super. 574, that the then legislation ¹⁹ did not confer the power to classify buildings according to use and occupancy in a building code, but only to make regulations irrespective of use. Such power was supplied by the Township Code of 1931, P.L. 1206, 53 P.S. § 19092—201 et seq.²⁰ "This control by the building laws and the municipal regulations founded thereon is basically the same as that imposed by the zoning ordinances" Commonwealth ex rel. Shooster v. Devlin, 305 Pa. 440, 445, 158 A. 161, 163.

In 1931 appellee enacted a building code fixing certain minimum requirements relating to light, air, sanitation and safety of buildings thereafter erected. The buildings were classified according to use, among them dwellings. Penalties were provided for those who built, used or permitted to be used any nonconforming buildings, including dwellings.

The validity of the *original* Building Code of 1931 is not challenged by the appellant as being invalid or unreasonable in any particular. It is a clear violation of this ordinance to build and use as a dwelling a nonconforming house such as, for instance, the familiar tourist camp cabin. It is no less a violation where the cabin is built without, and then moved into, the township and occupied as a dwelling.

In 1940 the township amended its building code by adding section 200, reading: "House trailer means any vehicle for living or sleeping purposes. If a house trailer is used for living or sleeping

^{19 [}Footnotes renumbered.] Act of 1917, P.L.1115, as amended by Act of 1919, P.L. 424.

 $^{^{20}}$ "The corporate power . . . shall be vested in the board of township commissioners. The board shall have power . . .

[&]quot;XVIII. To make regulations for the construction of new buildings and the alteration and repair of old ones, and to require that before the work begins municipal approval of the plans and specifications therefor be secured; to classify buildings or parts of buildings according to the use to be made of them; to specify the mode of construction of such different classes of buildings" 53 P.S. § 19092—1502. (Italics supplied.)

purposes within the township for an aggregate of more than thirty days in any period of one year, it shall be considered as a single family dwelling for all purposes of this ordinance."

Admittedly defendant, subsequent to 1940, permitted house trailers to be placed on his ground and to be used and occupied as dwellings, and the identical trailers have remained there and been used as dwellings for several years without interruption. Admittedly they do not conform to the requirements of the building code in a great number of respects, including sanitation and windows. This subjected him to the penalty imposed and from which he appealed.

A house trailer is simply a mobile house. It is as much a dwelling as any house which is built on a foundation and therefore not mobile. Indeed these house trailers were not resting on wheels but were "up on boxes, or some jacks of some sort." Some "from the floor of the trailer to the ground [were] covered around . . . with what appeared . . . to be a shingle, or composition . . . for breaking the wind." Sidewalks leading to each were constructed. Each was connected with water and electric lines. Communal lavatory and laundry facilities were provided by the defendant.

To say that these were not dwelling houses is an attempt to fictionalize a reality. They were used and intended to be used as homes, and were as much dwellings as any similarly sized structures could be. In fact they contained household conveniences rarely present in houses so small. They differed from the ordinary house only in respect to the ease with which they could be moved. They were very similar to the tourist cabins so frequently found along our highways.

The building code is not an attempt to regulate or prohibit a trailer camp, which the appellant contends can only be done under a zoning ordinance. This clearly appears from the clause that the trailer is not to be considered a dwelling until it has remained 30 days. This is a fair standard by which to determine whether the use is temporary and transient, and therefore legal, or settled and fixed, and therefore illegal. If the local government cannot fix a thirty day limit it can as well be argued that no limit can be fixed, which in turn means that permanency cannot be avoided.

In Indiana a thirty day limitation was sustained. Spitler v. Town of Munster et al., 1938, 214 Ind. 75, 14 N.E.2d 579, 115 A.L.R. 1395; in Ohio a sixty day limitation. Renker v. Village of Brooklyn, 1942, 139 Ohio St. 484, 40 N.E.2d 925; and in Michigan a ninety day limitation. Cady v. City of Detroit, 1939, 289 Mich. 499, 286 N.W. 805. In each of these cases the power was conferred on the local government. In the cases striking down such

provisions such power was not conferred or was in conflict with another statute, as in the later Michigan case of Richards v. City of Pontiac, 1943, 305 Mich. 666, 9 N.W.2d 885.²¹ The case at bar is one of first impression in Pennsylvania, but is controlled by the principle of local self-government having the right to exercise all powers conferred.

It is argued that a current house shortage ought to make this restriction void. That might be an argument why the local authorities ought not to enforce the ordinance, but certainly cannot render this judgment invalid. With neither the wisdom of the ordinance nor the rationality of its enforcement have we anything to do. These have been confided by our Constitution, not to the courts, but to the other two co-ordinate branches of the government. In Commonwealth v. Schaeffer, 98 Pa.Super. 265, at page 269, Judge Baldrige (now President Judge) stated: "It is our duty, instead of defeating the purpose of an ordinance and vitiating it, to resolve any doubt in regard to its construction in favor of its validity."

Judgment affirmed.22

(3) Restrictions in Deeds

The advanced student will be familiar with the development of so-called equitable servitudes, restrictions or covenants as private instruments of land use control. They have been widely used to preserve the integrity of more or less exclusive residential areas developed by private enterprise. They permit of various requirements as to cost of structures, floor space, cubic content and related matters, which might be questioned if laid down in a public regulation such as a zoning ordinance. They are necessarily confined in their reach, however, to the limited area controlled by the persons establishing the restrictions. This is in marked contrast with comprehensive zoning. A change in the character of the neighborhood may leave them unenforceable. courts have applied this notion narrowly, however. Missouri, the change must have occurred in the restricted area; changes in surrounding territory are not enough. Swain v. Maxwell. 355 Mo. 448, 196 S.W.2d 780 [1946].)

²¹ See "Automobile, Motor and Tourist Camps" by Charles S. Rhyne, Executive Director of the National Institute of Municipal Law Officers, Report No. 75—Legal and Administrative Problems of Municipal Regulations—for an able discussion of the various problems and respective rights. See also 115 A.L.R. 1400.

²² The principal case is criticized in 45 Mich.L.Rev. 225 (1946).

Prior to May 3, 1948, equitable servitudes had been effective in some states as race segregation measures, where quite obviously the same result could not have been achieved by governmental regulation. Residential segregation by public authority, even though in terms excluding whites from negro areas as well as the converse, was long since declared to be violative of the equal protection of the laws clause of the Fourteenth Amendment. City of Richmond v. Deans, 281 U.S. 704, 50 S.Ct. 407 (1930); Harmon v. Tyler, 273 U.S. 668, 47 S.Ct. 471 (1927); Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16 (1917). While in some states common law or statutory rules against restraints upon alienation had the effect of knocking the covenants out entirely or limiting their life or confining the restriction to use as distinguished from taking of title, there was assumed to be no constitutional infirmity. In 1926 the Supreme Court rejected an attack on the constitutionality of some District of Columbia covenants but obviously no question of equal protection of the laws could have been involved. Corrigan v. Buckley, 271 U.S. 323, 46 S.Ct. 521.

In Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836 (May 3, 1948), the Court determined that state court enforcement of covenants against sale to negroes was governmental action which denied negro purchasers equal protection of the laws. It was plainly asserted that the covenants standing alone did not violate the Fourteenth Amendment, but it remains to be seen whether the ingenuity of counsel will find some effective means of enforcement through self-help. On the same day it was decided that District of Columbia covenants should not be judicially enforced both because it would invade rights protected by the Civil Rights Act and because it would be contrary to the public policy of the United States. Hurd v. Hodge, 334 U.S. 24, 68 S.Ct. 847. See Comments 9 Ohio St.L.J. 325 (1948); 21 So.Calif.L. Rev. 358 (1948).

C. NEW STYLE—COMPREHENSIVE ZONING

"Zoning is the regulation by districts under the police power of the height, bulk and use of buildings, the use of land and the density of population." Bassett, Zoning 45 (1940).

The Supreme Court of the United States laid the constitutional ground work for comprehensive urban zoning in Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 54 A.L.R. 1016 (1926). It should suffice here to set out a digest of the case, rather than reproduce the valuable but rather lengthy opinion of Mr. Justice Sutherland, delivered for the court.

Ambler sued to enjoin enforcement of a comprehensive zoning ordinance. The village, a suburb of Cleveland, formed a rough parallelogram of about $3\frac{1}{2}$ miles each way. It was traversed east and west by 3 principal streets: Euclid Ave. on the south, St. Clair Ave. through the middle and Lake Shore Blvd. on the north. The Nickel Plate R. R. was 1500 to 1800 feet north of Euclid and Lake Shore R. R. about 1600 feet farther north. Ambler was the owner of a tract of 68 acres situated in the western end of the village and abutting on Euclid to the south and Nickel Plate to the north. Under the zoning ordinance the adjoining areas to the east and west were residence zones.

The ordinance divided the village into 6 use districts, 4 height districts and 4 area districts. The use districts ran from use 1, single family dwellings district, to use 6, industrial districts. Use 1 district was restricted entirely to single family residences and the other districts were cumulative as to use, that is, any uses of a more restricted district were permitted in them. Ambler's land fell in use 2 (two family houses), use 3 (apartment houses and public buildings), and use 6 (industrial). Ambler alleged that its land was held for industrial development and that for that purpose its market value was about four times its market value for residential use. The effect of the restrictions, it was contended, was to deny Ambler due process of law. No effort had been made, before bringing the suit, to obtain a building permit for industrial purposes or to get relief through the zoning board of appeals.

The district court held the ordinance unconstitutional and enjoined its enforcement. This decree was reversed by the Supreme Court. Justices McReynolds, Van Devanter and Butler dissented.

The principal points in the Sutherland opinion were:

- 1. The suit was not premature and Ambler had standing to sue since the burden of the allegations of the bill was that the ordinance, of its own force, operated to reduce the value of Ambler's land and destroy its marketability.
- 2. Since Ambler was complaining solely of the exclusion of industrial use, the operation of the ordinance to exclude other uses on part of its tract need not be considered.
- 3. Under complex modern conditions regulations which once might have been deemed arbitrary are commonly sustained. This applies to regulations excluding offensive businesses from residence areas. The broad regulation here will cover some inoffensive businesses but the inclusion of a reasonable margin to insure effective enforcement will not invalidate a law otherwise valid.

4. Even an exclusive residence zone is to be upheld on broad police power considerations such as protection of children and protection from fires. If considerations of this sort do not sustain the wisdom of the regulation, they are enough to avoid the stigma of that arbitrariness which spells unconstitutionality.

The decision was addressed to the constitutionality of the ordinance in its general scope, which left open the matter of its validity as respects the application of particular provisions to particular circumstances.

In Nectow v. City of Cambridge, 277 U.S. 183, 48 S.Ct. 447 (1928), the Supreme Court applied the principle that particular provisions of a zoning ordinance must be reasonable. no quarrel with the idea that a zoning ordinance, although valid as a whole, may have particular provisions which cannot be sustained as reasonable exertions of the police power. There necessarily will be difficult border-line cases in which the zoning of particular property may be or appear to be rather arbitrary. In the Nectow case the decision was adverse to the ordinance. The opinion of the Court was not very helpful. The Court merely accepted the finding of a master, to whom the case had been referred, that the placing of certain land suitable for business development in a residence zone would not promote health or other police power objectives. That amounted to the substitution of the judgment of the master for that of the city governing body not on a plain question of fact but on the relation of the treatment of the locus to the ends of police power regulation. Cases of this sort hinge upon the particular circumstances and despite the disposition of the Court to regard the determination of the local governing body lightly, it cannot fairly be said that the case had served as a serious legal thorn in the side of effective zoning.

Reproduction here of a comprehensive zoning ordinance of a medium-sized American city should provide concrete expression of both zoning substance and procedure, afford the student a sample of draftsmanship and facilitate integration of the materials covered in class. For this purpose we have looked to the City of Warwick, Rhode Island.

ZONING ORDINANCE OF THE CITY OF WARWICK

It is ordained by the City Council of the City of Warwick as follows:

SECTION I: Purpose

For the purpose of promoting the public health, safety, morals, and general welfare, and acting under authority of Chapter 342, General Laws of Rhode Island, and all amendments and additions

thereto, the City Council of Warwick hereby enacts this Zoning Ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population and the location and use of buildings, structures and land for trade, industry, residence and other purposes.

SECTION II:

The herein zoning regulations and the districts herein set forth are approved and established. The Zoning Map and the Record Book of Lot Classifications which accompany this Ordinance, bearing the signature of the City Engineer, and dated June 21, 1945, are hereby declared to be a part hereof. No building or land shall be used and no building shall be erected or structurally altered except in conformity with the regulations herein prescribed.

SECTION III: Districts

For the purpose of this Ordinance the City of Warwick is hereby divided into Six (6) classes of districts, designated as follows:

- 1. Residence AA Districts
- 2. Residence A Districts
- 3. Residence B Districts
- 4. Residence C Districts
- 5. Business D Districts
- 6. Industrial E Districts

SECTION IV: Residence AA Districts

In a Residence AA District the following regulations shall apply:

(A) Residence AA District Uses:

A building may be erected, altered, or used, and a lot or premises may be used for any of the following purposes and no other:

- 1. One single family detached dwelling.
- 2. Church, public or parochial school, college, library, museum.
- 3. Philanthropic or religious institution, other than a penal or correctional institution.

(B) Accessory Uses:

In a Residence AA District a use accessory to an authorized use shall be permitted subject to the provisions of sub-section (A) of Section X.

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(C) Area of Lot:

In a Residence AA District the minimum lot area for each principal building hereafter erected shall be 40,000 square feet.

(D) Street Frontage:

In a Residence AA District the minimum street frontage for each building hereafter erected shall be 150 feet.

(E) Front Yards:

In a Residence AA District every building hereafter erected shall have a front yard not less than 30 feet in depth between a front street line and the building, and not less than 30 feet in depth between a side street line and the building.

(F) Side Yards:

In a Residence AA District every building hereafter erected shall have a side yard not less than 30 feet in width along each lot line.

(G) Rear Yards:

In a Residence AA District every building hereafter erected shall have a rear yard not less than 30 feet in depth.

(H) Height:

In a Residence AA District no building may be erected to a height in excess of 40 feet.

SECTION V: Residence A Districts:

In a Residence A District the following regulations shall apply:

(A) Residence A District Uses:

In a Residence A District a building may be erected, altered, or used, and a lot or premises may be used for a use permitted in a Residence AA District.

(B) Accessory Uses:

In a Residence A District a use accessory to an authorized use shall be permitted subject to the provisions of sub-section (A) of Section X.

(C) Area of Lot:

In a Residence A District the minimum lot area for each building hereafter erected shall be as follows:

- 1. For each single family detached dwelling, 10,000 square feet.
- 2. For a philanthropic or religious institution, church, public or parochial school, college, library, or museum, 40,000 square feet.

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(D) Street Frontage:

In a Residence A District the minimum street frontage for each building hereafter shall be as follows:

- 1. For each single family detached dwelling, 100 feet.
- 2. For a philanthropic or religious institution, church, public, or parochial school, college, library, or museum, 150 feet.

(E) Front Yards:

In a Residence A District every building hereafter erected shall have a front yard not less than 30 feet in depth between a front street line and the building, and not less than 30 feet in depth between a side street line and the building.

(F) Side Yards:

In a Residence A District every building hereafter erected shall have a side vard not less than 20 feet in width along each lot line other than a front street line, side street line, or rear line.

(G) Rear Yards:

In a Residence A District every building hereafter erected shall have a rear vard not less than 20 feet in depth.

(H) Height:

In a Residence A District no building may be erected to a height in excess of 40 feet.

SECTION VI: Residence B Districts:

In a Residence B District the following regulations shall apply:

(A) Residence B District Uses:

A building may be erected, altered or used, and a lot or premises may be used for any of the following purposes and for no other:

- 1. A use permitted in a Residence AA or Residence A District.
- 2. A double cottage.
- 3. Commercial Nurseries and Greenhouses.
- Raising of Crops. 4.
- Hospital or Sanatorium, other than for the care of the insane or feeble minded, and other than for liquor and drug addicts.

(B) Accessory Uses:

In a Residence B District a use accessory to an authorized use shall be permitted subject to the provisions of sub-section (A) of Section X.

(C) Area of Lot:

In a Residence B District the minimum lot area for each building hereafter erected shall be as follows:

- 1. For each single family detached dwelling, 7,000 square feet.
- 2. For each double cottage, 14,000 square feet.
- 3. For a philanthropic or religious institution, church, public or parochial school, college, library, museum, hospital or sanatorium, 40,000 square feet.

(D) Street Frontage:

In a Residence B District the minimum street frontage for each building hereafter erected shall be as follows:

- 1. For a single family dwelling, 70 feet.
- 2. For a double cottage, philanthropic or religious institution, church, public or parochial school, college, library, museum, hospital or sanatorium, 140 feet.

(E) Front Yards:

In a Residence B District every building hereafter erected shall have a front yard not less than 25 feet in depth between a front street line and the building, and not less than 25 feet in depth between a side street line and the building.

(F) Side Yards:

In a Residence B District every single family detached dwelling hereafter erected shall have a side yard not less than 8 feet in width along each lot line other than a front street line, side street line, or rear line, excepting that a double cottage, a philanthropic or religious institution, church, public or parochial school, college, library, museum, hospital or sanatorium hereafter erected shall have a side yard not less than 25 feet in width along each lot line other than a rear lot line.

(G) Rear Yards:

In a Residence B District every building hereafter erected shall have a rear yard not less than 20 feet in depth, excepting that a double cottage, philanthropic or religious institution, church, public or parochial school, college, library, museum, hospital or sanatorium hereafter erected shall have a rear yard not less than 30 feet in depth.

(H) Height:

In a Residence B District no building may be erected to a height in excess of 40 feet.

SECTION VII: Residence C Districts:

In a Residence C District the following regulations shall apply:

(A) Residence C District Uses:

A building may be erected, altered or used, and a lot or premises may be used for any of the following purposes and for no other:

- 1. A use permitted in a Residence AA, Residence A, or Residence B District.
- 2. A two family house not exceeding two and one-half stories in height.
- 3. An apartment house, subject to the approval of the plans by the Zoning Board of Review.

(B) Accessory Uses:

In a Residence C District a use accessory to an authorized use shall be permitted subject to the provisions of sub-section (A) of Section X.

(C) Area of Lot:

In a Residence C District the minimum lot area for each building hereafter erected shall be as follows:

- 1. For each single family detached dwelling, 5,000 square feet.
- 2. For each double cottage, two family dwelling not exceeding two and one-half stories in height, and apartment house, 10,000 square feet.
- 3. For a philanthropic or religious institution, church, public or parochial school, college, library, museum, hospital, or sanatorium, 40,000 square feet.

(D) Street Frontage:

In a Residence C District the street frontage of the lot for each building erected thereon shall be as follows:

- 1. For each single family detached dwelling, 50 feet.
- 2. For each double cottage, two family dwelling not exceeding two and one-half stories in height, and apartment house, 100 feet.
- 3. For a philanthropic or religious institution, church, public or parochial school, college, library, museum, hospital, or sanatorium, 140 feet.

(E) Front Yards:

In a Residence C District every building hereafter erected shall have a front yard not less than 25 feet in depth between a front street line and the building, and not less than 25 feet in depth between a side street line and the building.

(F) Side Yards:

In a Residence C District every building hereafter erected on a lot requiring an area of 5,000 square feet shall have a side yard not less than 7 feet in width along each lot line other than a front street line, side street line, or rear line; and where two side yards are required the sum of the widths of the two side yards shall be not less than 15 feet. In a Residence C District every building hereafter erected on a lot requiring 10,000 square feet in area, or more, shall have a side yard not less than 20 feet in width along each lot line other than a front street line, side street line, or rear line.

(G) Rear Yards:

In a Residence C District every building hereafter erected on a lot requiring an area of 5,000 square feet shall have a rear yard not less than 20 feet in depth; and every other principal building shall have a rear yard not less than 25 feet in depth.

(H) Height:

In a Residence C District no building may be erected to a height in excess of 40 feet.

SECTION VIII: Business D Districts:

In a Business D District the following regulations shall apply:

(A) Business D District Uses:

A building may be erected, altered, or used, and a lot or premises may be used for any of the following purposes and for no other:

- 1. Store for retail trade.
- 2. Bank, office, studio, restaurant.
- 3. Shop for making of articles to be sold at retail on the premises.
- 4. Bus passenger station.
- 5. Recreational commercial enterprises, subject, however, to licenses being obtained from the Board of Police Commissioners.
- 6. Automobile salesrooms, garages or filling stations upon approval of the location thereof and the plans by the Zoning Board of Review.
- 7. Funeral parlors.
- 8. Theaters.
- 9. Barber shops and beauty parlors.
- 10. Hotel.
- 11. Service establishments employing not more than four persons, for printing, plumbing and steamfitting, tailoring, shoe repairing, carpentering, electrical work, laundering, and cleansing.

(B) Accessory Uses:

In a Business D District a use accessory to an authorized use shall be permitted subject to the provisions of sub-section (B) of Section X.

(C) Front, Back, and Side Yard Restrictions:

In a Business D District any premises immediately abutting a residential District shall provide on the sides immediately contiguous to the residential District front, back, or side yard restrictions similar to those provided for in the adjoining residential District.

(D) Height:

In a Business D District no building may be erected to a height in excess of 40 feet.

SECTION IX: Industrial E Districts:

In an Industrial E District the following regulations shall apply:

(A) Permitted Uses in Industrial E Areas located 300 feet or more from any Residential Area:

A building may be erected, altered, or used, and a lot or premises may be used for any of the following purposes and for no other, excepting as provided in sub-section (B) of this Section:

- 1. A use permitted in a Business D District.
- 2. Storage in bulk of, or warehouse for such material as building material, contractors' equipment, clothing, cotton, drugs, dry goods, feed, fertilizer, food, fuel, furniture, hardware, ice, machinery, metals, oil and petroleum in quantities less than tank car loads, paint and paint materials, pipe, rubber, shop supplies, or wool.
- 3. Wholesale business, job printing, newspaper printing.
- 4. Textile manufacture.
- 5. Cold storage plant, ice manufacture.
- 6. Creamery, ice cream manufacture, bottling works, milk bottling or central distributing station, baking plant.
- 7. Dyeing or dry cleaning plant, power laundry.
- 8. Freight terminal, grain elevator, railroad yards.
- 9. Coke, coal, or wood yard; lumber yard.
- 10. Foundry, machine shop, boat building.
- 11. Stone cutting, monument works.
- 12. Central electric light or power generating plant, central steam plant.

13. Manufacturing or industrial operations not heretofore listed which emit dust, odor, gas, fumes, noise or vibration comparable in character or in aggregate amount not greater than in the uses set forth in this sub-section.

(B) Special Permit Uses:

In an Industrial E District a building may be erected, altered, or used, and a lot or premises may be used for any of the following purposes, only upon a Special Permit issued by the Zoning Board of Review as provided in Section XVI:

- 1. Any of the uses set forth in sub-section (A) hereof located within 300 feet of a Residence District.
- 2. Any other manufacturing or industrial operation not included in sub-section (A) hereof and not prohibited in sub-section (C) hereof.

(C) Prohibited Uses:

No building or premises shall be used, and no building shall be erected which is arranged, intended, or designed to be used for any of the following purposes:

- 1. Petroleum refining.
- Cement, lime, gypsum, or plaster of paris manufacture.
- 3. Chloric or hydrochloric, nitric, picric or sulphuric acid manufacture; smelting of copper, tin, zinc, or iron ore.
- 4. Manufacture of explosives or storage of explosives in bulk.
- 5. Abattoir, not including the killing of fowl; distillation of bones; fat rendering and manufacturing of tallow or grease; fertilizer manufacture; glue manufacture; hair manufacture; offal or dead animal reduction or dumping; stock yard.

(D) Accessory Uses:

A use accessory to an authorized use shall be permitted subject to the provisions of sub-section (B) of Section X.

(E) Front, Back and Side Yard Restrictions:

In an Industrial E District any premises immediately abutting a Residential District shall provide on the sides immediately contiguous to the Residential District front, back, or side yard restrictions similar to those provided for in the adjoining Residential District.

(F) Height:

In an Industrial E District no building may be erected to a height in excess of 40 feet.

SECTION X: Accessory Uses:

(A) Accessory Uses in Residential Districts:

In a Residential District Accessory Uses shall be permitted as follows:

- 1. The keeping of pigeons, poultry, and animals, exclusive of dogs and cats maintained for pets, subject to the written approval of the Superintendent of Health or the Sanitary Inspector.
- 2. As an accessory use to a farm, nursery, or truck garden, the sale at retail or farm, garden, or nursery products raised on the premises.
- 3. As an accessory use to a Real Estate Subdivision or Development, a temporary sales office.
- 4. As an accessory use to a dwelling or apartment:
 - a. The office of a physician, surgeon, dentist or other professional person, provided such office is in the dwelling or apartment used by such professional person as a private residence.
 - b. The furnishing of table board or the renting of rooms, provided, however, that permission for such is first obtained from the Zoning Board of Review.
 - c. The carrying on of an accessory home occupation, provided the same is carried on in the dwelling or apartment occupied as a private residence by the person carrying on such home occupation, and provided, however, that permission for such is first obtained from the Zoning Board of Review.
- 5. Announcement signs shall be permitted as an accessory use subject to the following limitations:
 - a. In connection with an authorized professional or customary home occupation there may be displayed a small name plate with a statement of the profession or the nature of the occupation.
 - b. In connection with the sale, renting, or improvement of real estate there may be displayed one sign, not to exceed 24 square feet in area on each street frontage.
 - c. In connection with any authorized use not specifically provided for in sub-section (a) or (b) of this paragraph there may be displayed one sign not to exceed 12 square feet in

- 6. A detached garage for the storage only of motor vehicles as an accessory use to the principal building shall be permitted subject to the following limitations:
 - a. Capacity of Garage:
 - i. In an AA Residence District a detached garage having capacity for three cars shall be permitted.
 - ii. In an A, B, or C Residence District a detached garage having a capacity for two cars shall be permitted. In the case of a double cottage, a detached garage having a capacity for two cars shall be permitted for each family.
 - iii. As an accessory use to an apartment house in a Residence C District a detached garage shall be permitted having a capacity of one car for each family for which such apartment house is arranged.
 - b. Location of Garage:

A detached garage in a Residence District shall be located in the back yard area of the lot, and shall be placed not less than five feet from the side and rear lines of the lot. provided, however, that a garage erected on a corner lot shall be located in the backvard area and not nearer the side street line than the permitted alignment of the main buildings on said side street. In the case of a double cottage only a detached two-car garage shall be permitted in the rear yard on each half of the lot. The size and location of a detached garage as an accessory use to any other principal building allowed in a Residence District shall be determined by the Zoning Board of Review.

- 7. As an accessory use to any authorized use:
 Any other use clearly accessory to such authorized use, provided that no use enumerated as a permitted use in a less restricted district, except those specifically provided for in this sub-section, shall be permitted as an accessory use.
- (B) Accessory Uses in Business and Industrial Districts: In a Business or Industrial District any use accessory to an authorized use shall be permitted except as follows:

- 1. In a Business D District the total surface area of all announcement signs on any one lot shall not exceed 40 square feet for each street frontage of the lot.
- 2. In a Business D District a motor vehicle repair shop shall be permitted as an accessory use only on approval of the Zoning Board of Review.
- 3. A garage for the storage of more than 5 motor vehicles shall be permitted as an accessory use only upon approval of the Zoning Board of Review.
- 4. No use enumerated as a Special Permit Use or a prohibited use in an Industrial District shall be permitted as an accessory use.

SECTION XI: Vision Clearance:

On any corner lot on which a front yard is required by this Ordinance no wall, fence, or other structure shall be erected, and no hedge, tree, shrub or other growth shall be maintained in such location within such required front yard space as to cause danger to traffic by obstructing the view.

SECTION XII: Exceptions:

(A) Height Limit Exceptions:

Nothing in this Ordinance shall apply to prevent the erection above the height limit of the church spire, tower or belfry, or of a flagpole, wireless tower, monument, chimney, water tank, or elevator bulkhead. Nothing in this Ordinance shall apply to prevent the erection above the height limit of a parapet wall or cornice for ornament and without windows extending above such height limit not more than five feet.

(B) Area and Yard Exceptions:

1. On any lot in separate ownership at the time of the passage of this Ordinance the area or the dimensions of which do not conform to the requirements of this Ordinance, it shall be necessary for the owner thereof to receive from the Zoning Board of Review a Special Exception for the erection of a dwelling thereon, and said Zoning Board of Review shall designate the size of the dwelling to be placed thereon and its location on said lot.

(C) Front Yard Exceptions:

 The space in a required front yard shall be open and unobstructed except that in a Residential District an uncovered porch may extend not to exceed eight feet into the front yard, and that the not more than two feet into the front yard, and that a covered but unenclosed entrance porch not over forty square feet in area may extend not to exceed six feet into the front yard.

2. In a block in a Residential District in which 25% or more of the frontage on one side of the street is improved with buildings, the front yard along a front line for a building hereafter erected shall extend to the alignment of such existing buildings instead of as provided in the preceding sections of this Ordinance; except that no building shall have a front yard along a front line of less than five feet in depth or need have a front yard along a front line of greater depth than thirty feet in an AA or an A District or twenty-five feet in a B or C District.

(D) Side and Rear Yard Exceptions:

- Ordinary projections of window sills, belt courses, cornices and other ornamental features shall be permitted to the extent of not more than four inches, except that if the building is not over two and one half stories in height the cornice or eaves may project not more than eighteen inches into such yard.
- 2. A through lot shall have two front yards of a depth as hereinbefore provided in this Ordinance.

(E) Alterations of Existing Buildings:

No building in a Residence C District shall be altered to accommodate additional families unless such building will, when altered, conform to the lot area, front yard, side yard, and rear yard requirements of this Ordinance for buildings hereafter erected in such district.

SECTION XIII: Non-conforming Uses:

- (A) Any use of property existing at the time of the passage of this Ordinance that is not an authorized use in the district in which such property is located shall be deemed a nonconforming use.
- (B) A non-conforming use may be continued subject to such regulations as to the maintenance of the premises, conditions of operation, and location and character of announcement signs as may in the judgment of the Board of Review be reasonably required for the protection of adjacent property.
- (C) A non-conforming use shall not be extended, but the extension of a use to any portion of a building which portion was

time of the passage of this Ordinance shall not be deemed the extension of a non-conforming use.

- (D) A non-conforming use shall not be changed to another non-conforming use but may be changed to a conforming use. A non-conforming use, if changed to a conforming use, may not hereafter be changed back to a non-conforming use.
- (E) No additional tanks or pumps shall be added to a non-conforming filling station.

SECTION XIV: Enforcement:

This Ordinance shall be enforced by the Inspector of Buildings acting in the name of and on behalf of the City of Warwick. No building shall hereafter be erected or structurally altered until a permit authorizing the same shall be issued by the Inspector of Buildings.

SECTION XV: Board of Review:

(A) Organization and Powers:

A Board of Review is hereby established to consist of five (5) members, each to hold office for the term of five (5) years. Said Board of Review shall have all the powers and shall be subject to all the duties as prescribed in Chapter 342 of the General Laws of 1938 and all amendments and additions thereto. Consistent with the provisions of said chapter and of this Ordinance the Board of Review shall determine its own rules of procedure. The Chairman, or in his absence the Acting Chairman, may administer oaths and compel the attendance of witnesses. All hearings of the Board shall be open to the public. Said Board shall keep minutes of its proceedings showing the vote of each member upon each question or if such member be absent or fails to vote indicating such fact; and shall keep records of its examinations and other official actions, all of which shall be filed immediately in the office of the Board and shall be a public record. The Board of Review shall have the following powers:

- To hear and decide appeals where it is alleged there is any error in a determination made by an administrative officer in the enforcement of Chapter 342 of the General Laws of 1938 and all amendments and additions thereto, and of this Ordinance.
- 2. To authorize upon appeal in special cases such variances in the application of the terms of the Ordinance as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the provisions of the Ordinance will result in unnecessary hardship and so that the

- spirit of the Ordinance shall be observed and substantial justice done.
- 3. In appropriate cases and subject to appropriate conditions and safeguards to make special exceptions to the terms of this Ordinance where the exception is reasonably necessary for the convenience and welfare of the public.
- 4. In appropriate cases and subject to appropriate conditions and safeguards to make special exceptions to the terms of this Ordinance in harmony with its general purpose and intent in the following cases:
 - To permit minor irregularities in the alignment of Buildings.
 - To grant the extension of a building or a use into a more restricted district immediately adjacent thereto.
 - c. In undeveloped sections of the city to allow temporary and conditional permits for structures and uses that do not conform to the regulations herein prescribed, provided that no such permit shall be for more than two years.
 - **d.** To authorize the change of a non-conforming use to one no more harmful or objectionable.
 - e. To authorize in specific cases such variances in the application of the terms of the Ordinance as will not be contrary to the public interest where owing to special conditions a literal enforcement of the provisions of the Ordinance will result in unnecessary hardship and so that the spirit of the Ordinance shall be observed and substantial justice done.

B) Appeals:

Appeals to the Board of Review may be taken by any person aggrieved, or by any officer, department, board or bureau of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time as provided by the rules of the Board, by filing a notice of appeal, specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the Board all the papers constituting the record upon which the action appealed from was taken.

An appeal shall stay all proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the Board of Review after the

notice of appeal shall have been filed with him that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the Board of Review or by a court of competent jurisdiction on application therefor and upon notice to the officer from whom the appeal is taken and on due cause shown.

In exercising the above mentioned powers the Board may, in conformity with the provisions of this chapter, reverse, or affirm wholly or partly, or may modify the order, requirement, decision or determination appealed from, and may make such order, requirement, decision or determination, as ought to be made, and to that end shall have all the powers of the officer from whom the appeal was taken.

The concurring vote of three members of the Board shall be necessary to reverse any order, requirement, decision, or determination of any such administrative officer; but the concurring vote of four members of the Board shall be required to decide in favor of the appellant or the applicant on any matter within the discretion of the Board upon which it is required to pass under such Ordinance, or to effect any variation in the application of this Ordinance.

The Board of Review in its decisions on any matter coming before it under this Ordinance shall record in its minutes the pertinent and material facts and the reasons upon which its decisions are based.

SECTION XVI: Special Permit Industrial Uses:

After public notice and hearing the Board may issue special permits with appropriate conditions and safeguards for the establishing in an Industrial District of the industrial uses enumerated in sub-section (B) of Section IX when in its judgment the general welfare will be served thereby and adjoining properties will not be substantially or permanently injured.

SECTION XVII: Interpretation:

In interpreting and applying the provisions of this Ordinance, they shall be held to be the minimum requirements adopted for the promotion of health, safety, morals, comfort, convenience, or the general welfare.

SECTION XVIII: Penalty for Violation:

Any person, partnership, association or corporation violating any of the provisions of this Ordinance shall be punished by a fine not exceeding One Hundred (\$100.00) Dollars for each offense; and each day that such violation shall continue shall be deemed to constitute a separate offense.

SECTION XIX: Definitions:

Certain words in this Ordinance are defined for the purpose thereof as follows:

- 1. Words used in the present tense include the future; the singular number includes the plural; the word lot includes the word plot.
- 2. A *building* is any structure other than a boundary wall or fence less than six feet in height.
- 3. The *established grade* is the elevation of the street grade as fixed by the city.
- 4. A *street line* is the dividing line between the street and the lot.
- 5. A front line is (a) the street line of a lot having but one street line; (b) each street line of a through lot; (c) in the case of a corner lot or a lot having no street line the lot line designated as the front line by the owner or the Building Inspector in case the owner fails to make such designation.
- 6. A *side street line* is any street line of the lot not a front street line.
- 7. A rear line, except in the case of a through lot, is the lot line opposite and approximately parallel to the front line.
- 8. The *height* of a building or portion of a building shall be measured from the average established grade at the street lot line, or from the average natural ground level if higher or if no street grade has been established, up to the mean level of the roof thereof. Where no roof exists, or where there are structures wholly or partly above the roof, the height shall be measured to the highest point of such building or structure.
- 9. A rear yard is an open unoccupied space on the same lot with the building between the rear line of the building and the rear line of the lot and extending across the full width of the lot or to a front yard extending along the side street line of the lot.
- 10. A front yard is an open unoccupied space on the same lot with the building situated between the building and the front street line or the side street line of the lot and extending across the full width of the lot.
- 11. A *side yard* is an open unoccupied space on the same lot with the building situated between the building

- and a side line of the lot other than a street line and extending longitudinally to a yard or lot line. Any lot line not a rear line, a front line, or a side street line, shall be deemed a side line.
- 12. A lot is a parcel of land occupied or designed to be occupied by one principal building or use and the accessory buildings or uses customarily incident to it, including such yards, courts, and other spaces as are arranged, intended, or designed to be used in connection with such building or use. A narrow strip of land providing access to a rear lot shall not be deemed a part of such lot. A lot may or may not be the land shown as a lot on a plat.
- 13. A through lot is a lot having two street lot lines that do not intersect and no street lines that do intersect.
- 14. A *corner lot* is a lot having two or more street lot lines that intersect.
- 15. A *family* is one or more persons living together as a single housekeeping unit.
- 16. A single family detached dwelling is a building arranged, intended, or designed for residence use only and for occupancy by one family only, having yards along all lot lines or having yards along all lot lines other than street lines.
- 17. A *cottage* is a dwelling not over two and one-half stories in height, arranged, intended, and designed for occupancy by one family only.
- 18. A *double cottage* is a dwelling consisting of two cottages, each having separate entrances and designed for occupancy by one family only, and separated from each other by a main partition wall.
- 19. A *two family dwelling* is a building arranged, intended, or designed for residential use only and for occupancy by two families only, living independently of each other.
- 20. An apartment house is a building arranged in several suites of connecting rooms, each suite designed for independent housekeeping with certain mechanical conveniences such as heat and light in common with all families occupying the building.
- 21. A garage is a building or portion of a building arranged, intended, or designed to be used for the storage of motor vehicles, or for the making of repairs to motor vehicles.

- 22. A filling station is a building or premises, or portion thereof, arranged, intended, or designed to be used for the sale of gasoline or other motor vehicle, airplane, or motor boat fuel.
- 23. An accessory building or use is a building or use customarily incidental and accessory to the principal building or use and located on the same lot with such building or use.
- 24. An announcement sign is any outdoor sign located within the view of persons passing on the public highway, whether a separate structure, object, or device, or attached to or painted on another structure, object, or device, bearing an advertisement relating to the premises on which such sign is located, except that the following shall in no case be considered as announcement signs: (a) Any sign designed to be read solely by persons on the premises; (b) Any sign less than thirty-six square inches in area.

SECTION XX: Validity of Ordinance:

If any section, paragraph, subdivision, clause, phrase, or provision of this Ordinance shall be adjudged invalid or held unconstitutional, the same shall not affect the validity of this Ordinance as a whole, or any part or provision thereof, other than the part so decided to be invalid or unconstitutional.

SECTION XXI:

This Ordinance shall take effect on the 21st day of June, 1945, and all Ordinances and parts of Ordinances inconsistent herewith are hereby repealed.

A difficult problem in zoning has existed from the outset as to how to hold matters in statu quo until a comprehensive zoning ordinance might finally be enacted. It takes time to develop and adopt a zoning plan. Legal procedures for enactment usually involve separate consideration and report by a zoning commission and public hearings both by the zoning commission and the local governing body. It has been decided in New York, moreover, that if substantial changes are made in a proposed zoning ordinance after the hearing by the governing body a new hearing must be conducted. Village of Mill Neck v. Nolan, 233 App.Div. 248, 251 N.Y.S. 533 (1931), affirmed 259 N.Y. 596, 182 N.E. 196 (1932). At all events, the process takes time. The problem cannot be met merely by administrative refusal to issue building permits. State ex rel. Fitzmaurice v. Clay, 208 La. 443, 23 So.2d 177

(1945). Can it be done by stop-gap ordinance tying up the issuance of building permits or imposing temporary zoning regulations? The cases are divided. See Note 136 A.L.R. 844 (1942). The former alternative presents less logical difficulties since the stop-gap measure would not, literally at least, be a zoning ordinance.

In the early days of urban zoning it was the prevailing attitude that permissible uses should be cumulative downward from the most restricted use. Thus, property in an industrial zone might be used for residence. This was an imperfect expression of comprehensive zoning theory since it emphasized the degree of restrictedness instead of the allocation of uses to appropriate areas. This has been recognized in later developments. The student will observe that the City of Warwick ordinance cumulates uses down through the lowest residential classification but excludes residences from the commercial and industrial zones.

Comprehensive rural zoning has been highly developed in Wisconsin, where every county is zoned, but has gained little headway elsewhere. It is understandable that our rural people would look with least favor upon public control of land uses. While the techniques of rural and urban zoning are much the same, objectives differ. This is apparent from the language of the Wisconsin enabling act.

"The county board of any county may by ordinance regulate." restrict and determine the areas within which agriculture, forestry and recreation may be conducted, the location of roads, schools, trades and industries, the location, height, bulk, number of stories, and size of buildings and other structures, the percentage of lot which may be occupied, size of yards, courts, and other open spaces, the density and distribution of population, and the location of buildings designed for specified uses, and establish districts of such number, shape and area, and may also establish set-back building lines, and may further regulate, restrict and determine the areas in and along or in or along natural watercourses, channels, streams and creeks in which trades and industries, filling or dumping, erection of structures and the location of buildings may be prohibited or restricted, and may adopt an official map or maps which will show thereon such areas, outside the limits of incorporated villages and cities, as such county board may deem best suited to carry out the purposes of this section." Wis.Stats. § 59.97 (1) (a) (1947).

"A variety of reasons has been advanced in support of the social desirability of these land-use regulations. They include prevention and control of isolated and scattered settlement with its attendant evils of disproportionately high governmental expenditures for roads and schools, prevention of tax delinquency,

curbing serious fire hazards, making police surveillance more effective, combatting inadequate regulation of public health, overcoming the lack of social and community facilities available to more compact settlement, control of erosion, conservation of natural resources and the desirability of making the 'best use' of land." Ralph B. Wertheimer, "Constitutionality of Rural Zoning" 26 Calif.L.Rev. 175 (1938). Mr. Wertheimer concluded that rural zoning is a valid exercise of the police power. He is supported by an opinion of the Attorney General of Wisconsin. 20 Ops.Atty.Gen. of Wis. 751 (1931). The Wisconsin Supreme Court has not been confronted with the question.

In contrast with comprehensive urban zoning, which attacks the problem on an all-embracing basis designed to effectuate a studied and coherent plan of land uses, is the superficial process of piecemeal zoning. Perhaps it has a legitimate place in county zoning of the urban fringe, but the random singling out of particular sections of a city for zoning without controlling land uses in other sections is another matter. There is, however, some judicial authority to sustain such zoning. State ex rel. Civello v. City of New Orleans, 154 La. 271, 97 So. 440 (1923). A good enabling act for urban zoning would be confined to comprehensive zoning. The Standard Zoning Act, which was sponsored by the United States Department of Commerce under the aegis of Secretary Hoover and which has been adopted in a number of states, is so drawn. It does not authorize piecemeal measures. Johnson v. City of Huntsville, 249 Ala. 36, 29 So.2d 342 (1947).

COUNTY COMMISSIONERS OF ANNE ARUNDEL COUNTY v. WARD

Court of Appeals of Maryland, 1946. 186 Md. 330, 46 A.2d 684.

Henderson, Judge. On May 7, 1945, a petition for a writ of mandamus was filed against the appellants in the Circuit Court for Anne Arundel County, alleging that the appellee was the owner of two lots in a subdivision of Bay Ridge, having a frontage of 200 feet on Bay Drive and 243 feet on Upsher Ave.; that he made application on April 28, 1945 for a building permit to erect on the rear of his lots five rustic, 16' x 16' cabins at a cost of \$300 per cabin, and one rustic central service building, 16' x 32', to cost \$600; that the permit was refused on May 1, 1945; that the refusal was "arbitrary, unlawful and unjust and in violation of the plaintiff's rights".

An answer was filed to the petition setting up certain zoning regulations, adopted by the County Board on January 30, 1945,

pursuant to authority conferred by chapter 551 of the Acts of 1943. The petitioner demurred to the answer, and the case was submitted to the trial court upon an agreed statement of facts.

It is conceded that the application for permit complied in all respects with the building Code then in force, but it is also conceded that it violated the applicable zoning regulations, which called for "one-family residences; no apartments", not more "than one residence on a lot with a fifty (50) foot front", and no house "to contain less than 3,200 cubic feet" or "cost less than \$2,500."

Bay Ridge is a peninsula located at the mouth of the Severn River, about four miles by road from Annapolis. Where not surrounded by water, or bordered by water, the area is bordered by privately owned farm land. The area contains about 300 acres and was surveyed and laid out in building lots about 1920; since that time it has been maintained as a residential community, with the exception of about 12 acres developed as a bathing beach and summer resort. Most of this acreage is covered with timber and unimproved. There are about 200 private residences most of which are suitable for year-round habitation. Building restrictions substantially identical with the zoning restrictions were incorporated in the original deeds, but these expired in 1935. The petitioner purchased his lots subsequent to 1935. The proposal to zone was presented to the County Commissioners August 2, 1944, by Bay Ridge Civic Association, a body corporate. Several public hearings were held thereon, after due notice, and the regulations were finally adopted, with amendments, on January 30. 1945.

The enabling Act, chapter 551 of the Acts of 1943, effective May 4, 1943, read as follows:

"Zoning.

"516. For the purpose of promoting health, safety, morals, and the general welfare of the community, the County Commissioners of Anne Arundel County are hereby empowered to designate residence areas within said County and to regulate, restrict or prohibit the location and use of buildings, structures and land for trade, industry, other commercial enterprises and residences or other purposes within said areas. Such regulations shall be made in accordance with a comprehensive plan. They shall be designed to reduce congestion in the roads, streets and alleys; to promote safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land and to avoid undue concentration of population; to facilitate adequate provision for

schools, parks, water, sewerage, transportation and other public requirements, conveniences and improvements, including such public utility buildings, structures and facilities as may be required in each district for the storage and/or distribution of gas and electricity.

"For all or any of said purposes the County Commissioners of Anne Arundel County may designate within the County certain residence districts or divisions of such number, shape and area as may be deemed best suited to carry out the purposes of this subtitle, and within such districts they may regulate and restrict the erection, construction, reconstruction, alteration, repair and use of buildings, structures and land. All such regulations shall be uniform for each class or kind of building or structure throughout each district, but the regulations in one district may differ from those in other districts.

"517. The County Commissioners shall determine the manner in which regulations and restrictions, and the boundaries of such districts, shall be established and enforced, and from time to time amended, supplemented and changed. Before determining the boundaries of the proposed districts and the regulation to be enforced therein, they shall hold a public hearing or hearings thereon, giving at least fifteen days notice in a newspaper of general circulation throughout the County, of the place and time of the beginning of such hearing or hearings. The County Commissioners shall have power to amend, supplement or repeal the regulations or restrictions adopted by them, provided that before doing so they shall follow the same procedure with respect to notice and public hearings as is herein provided for the original regulations and restrictions.

"518. The County Commissioners are hereby vested with such duties and powers as may be necessary and advisable for the proper administration of this sub-title and of such zoning regulations as they may adopt under the provisions of this sub-title, including the power to make general exceptions to permit continuance of existing uses and to permit limited trade or commercial uses of designated streets or blocks within residence areas, and including the power to summon and compel the attendance of witnesses.

"519. Any person, persons, taxpayer, officer, department, board or bureau of the County, jointly or severally aggrieved by any decision of the County Commissioners of Anne Arundel County, may, within thirty days after the filing of such decision in the office of the County Commissioners, appeal to the Circuit Court for Anne Arundel County.

"The said Court shall hear all such appeals de novo and shall have power to affirm the decision of the County Commissioners of Anne Arundel County, or reverse the same, in whole or in part, and may remand any case for the entering of a proper order or for further proceedings, as the Court shall determine. . . ."

The regulations adopted read as follows:

- "1. The entire area of Bay Ridge is to be strictly residential as per the duly recorded plat of Bay Ridge. It shall be limited to one family residences; no apartments. This shall not apply to the erection of a Community Club House and Pier to be erected by the residents of Bay Ridge.
- "2. No Building shall be erected in Bay Ridge nearer to the avenue, street or drive on which it fronts, as now laid out on the plats of Bay Ridge Realty Corporation, than forty (40) feet, measuring on the center of the front lot line, or five (5) feet from the rear or side line. Any separate garage shall be erected on the rear part of lots and not less than seventy-five (75) feet from the front Building line.
- "3. There shall not at any time be more than one residence on a lot with a fifty (50) foot frontage. No building shall be erected on a lot having an average width of less than fifty (50) feet, or an area of less than 5,000 square feet.
- "4. No house shall be constructed on any lot fronting the Severn River, the Chesapeake Bay, Sands Avenue, Lake Drive from Sands Avenue, to Decatur Avenue, Decatur Avenue, Barry Avenue and Farragut Road, to contain less than 5,000 cubic feet, and to cost less than \$3,500. On all other lots no house shall be constructed to contain less than 3,200 cubic feet and cost less than \$2,500. All buildings used as residences, or for business purposes in Bay Ridge shall conform to the Building Code and shall be provided with interior, sanitary plumbing.
- "5. No wines, distilled, or fermented liquors, or intoxicating drinks of any kind shall be sold, or offered for sale in Bay Ridge.
- "6. No hunting shall be permitted in the area zoned, and no poultry or animals except dogs and cats, and these not to be allowed to run at large shall be kept, nor any nuisance of any kind kept on property, which shall be dangerous to health or obnoxious.
 - "7. All wells shall be drilled and capped. (Artesian).
- "8. All plumbing and septic tanks and disposal fields must be approved and passed by Anne Arundel County Board of Health. All residences built in Bay Ridge must be equipped with a bath tub or shower, lavatory, sink, flush toilet connected to septic tanks, grease trap and sub-soil drain.
- "9. No commercial, manufacturing, industrial businesses of any kind, public bathing beaches, or places of public entertainment, shall be constructed, maintained or operated at any point within the zoning area, unless specifically permitted in covenant

or deed executed prior to the adoption of these regulations, this shall not apply however, to a community house, or entertainment, which shall be conducted as a community enterprise.

"10. No building with its accessory buildings, shall occupy in excess of forty (40) percent of an interior lot, nor in excess of fifty (50) percent of a corner lot.

"11. The lawful use of the buildings or premises, as existing and lawful at the time of the adoption of any regulation heretofore or hereafter adopted may be continued, although such does not conform to the provisions of such regulation, provided no structural alterations, except such as may be required by law or regulation, or no enlargement is made, or no new building is erected. Where structural alterations are made to a building of a nonconforming use, such use shall be changed to a use consistent with the provisions of these regulations for the district in which such building is located, only if the cost of such exceeds thirty (30) percent of the cost of the original building."

Three questions seem to be presented on this appeal: (1) the constitutional validity of the enabling act, (2) whether the regulations adopted are within the scope of the powers granted by the enabling act, and (3) whether the action of the Board of County Commissioners in refusing to issue a building permit was arbitrary, unlawful and in violation of the plaintiff's rights. . . .

This court is fully committed to the proposition that zoning, in general, is a valid exercise of the police power. R. B. Construction Co. v. Jackson, 152 Md. 671, 137 A. 278. But the point raised, upon which the lower court seems to have based its decision, at least in part, is that the enabling act conferred the authority to zone only selected residential districts, without regard to the county as a whole. In Ellicott v. Baltimore, 180 Md. 176, 181, 23 A.2d 649, 651, this court said: "The purpose of the zoning law is, of course, to devote general areas or districts to selected uses. 'The whole value of zoning lies in the establishment of more or less permanent districts, well planned and arranged.' Rehfeld v. City and County of San Francisco, 218 Cal. 83, 85, 21 P.2d 419, 420." In Kramer v. Mayor and City Council Baltimore, 166 Md. 324, 171 A. 70, it was held that the requirement of uniformity and comprehensiveness prescribed by the enabling act did not prevent the reservation of a right to deal with the location of filling stations in non-residential districts by special ordinances.

In State ex rel. Civello v. New Orleans, supra, the court said, 154 La. 271, 97 So. at page 445: "It is contended . . . the Constitution does not authorize the enactment of an ordinance applying to only one street, or to a very limited district, but contemplates that a zoning ordinance shall be so comprehensive as

to affect the whole municipality, or at least a large proportion of its area. We do not think so. . . . In some cities . . . it might be impracticable, to zone the whole area in one comprehensive ordinance." In Town of Marblehead v. Rosenthal, 1944, 316 Mass. 124, 125, 55 N.E.2d 13, the court said: "Nothing in the statute . . . or in common sense requires a municipality to impose restrictions upon all of its territory as a condition of the exercise of its zoning powers. The defendants concede that it is a question of reasonableness."

In Acker v. Baldwin, 1941, 18 Cal.2d 341, 115 P.2d 455, authority to zone was conferred upon a county, and the county authorities selected an area four miles square, bordering the City of Los Angeles, and zoned it for residential use. This action was sustained, although the rest of the county remained unrestricted. See also Board of Commissioners of Vanderburgh County v. Sanders, 1940, 218 Ind. 43, 30 N.E.2d 713, 131 A.L.R. 1048. Compare Frederick v. Board of Sup'rs, Jackson Co., 1945, 197 Miss. 293, 20 So.2d 92.

We think there is no constitutional requirement that an entire municipality or county be zoned at one time, or that regulations be uniform throughout the county. The enabling act in the case at bar contemplates uniformity for each class or kind of building or structure in a particular district; it specifically recognizes that restrictions may vary as between districts. It is not beyond the power of the legislature to limit the authority conferred upon the local legislative body to one type of use regulation, leaving open other areas in which business or industrial uses are unregulated. And this is true even though writers upon the subject generally condemn "piece meal" zoning as undesirable and even hazardous, and refer to this method as "block" rather than "comprehensive" zoning. Bassett, Zoning (1940 Ed.) p. 90; Metzenbaum, Law of Zoning (1930) p. 20; Bettman, Constitutionality of Zoning, 37 Harv.L.R. 834, 842. The wisdom of the method followed is for the legislature, not the courts, to determine.

The enabling act calls for a comprehensive plan, but we think such a requirement is met, if due consideration is given to the common needs of a particular district. No doubt such needs will vary with each area zoned. In the case at bar, the whole area of Bay Ridge appears to have been platted and developed originally for residential use, within well-defined natural boundaries. Up to this time it has contained no industrial and few commercial enterprises. Regulation 11 preserves the rights of nonconforming uses. It is not necessary in this case to approve or disapprove all of the regulations adopted; it may be questioned, for example, whether the limitations of cubic content and cost of improvements are valid. Bassett, Zoning (1940 Ed.) to p. 187; Senefsky

v. Lawler, 1943, 307 Mich. 728, 12 N.W.2d 387; Brookdale Homes, Inc., v. Johnson, 123 N.J.L. 602, 10 A.2d 477. Restrictive covenants, appropriate in contracts and deeds between private parties, may be wholly inappropriate in zoning regulations, which must be predicated upon a public interest. But the application for a permit to build five rustic cottages and a service cottage clearly violates Regulation 1, which limits the use to "one-family residences; no apartments", and this is the type of regulation that is usually found in zoning ordinances.

The appellee concedes that the proposed structures would constitute a technical violation of the regulations, but contends that the Board should have exercised discretion in granting the permit, in view of the housing shortage, and that its action was unreasonable. The Board of County Commissioners, as an administrative body, was bound to follow the regulations it adopted, in the exercise of its delegated legislative power. See Oppenheimer, Administrative Law in Maryland, 2 Md.L.R. 185, 193. The fact that it might have re-zoned the area, upon due notice and after hearing, does not alter its obligation to adhere to existing regulations, or authorize it to make special exceptions in individual cases. Chayt v. Zoning Appeals Board, 177 Md. 426, 9 A.2d 747, and cases cited; Sugar v. North Baltimore Methodist Protestant Church, 164 Md. 487, 165 A. 703. Compare County Commissioners of Prince George's County v. N. W. Cemetery Co., 160 Md. 653, 154 A. 452, and Gordon v. Commissioners of Montgomery Co., 164 Md. 210, 164 A. 676. The only exceptions specifically mentioned in the enabling act are "general exceptions to permit continuance of existing uses and to permit limited trade or commercial uses of designated streets or blocks within residence areas."

The case of Potts v. Board of Adjustment, 1945, 133 N.J.L. 230, 43 A.2d 850, 852, is guite in point. In that case an application for leave to convert a single-family dwelling into a twofamily apartment house, due to a "critical housing shortage", was denied. It was pointed out that the house was located in a residential district, zoned against two-family dwellings by a local ordinance, and that the local board was only empowered to make "marginal . . . adjustments between the opposing restrictions of adjoining districts", within the border area of 150 feet. The Court said: "Equality and uniformity of operation within the particular zone, as respects each class and kind of buildings. are basic in the statute. Invidious distinctions and discriminations are inadmissible. The essence of zoning is territorial division according to the character of the lands and structures and their 'peculiar suitability' for particular uses, among others, and uniformity of use within the division." The Court also said: "A housing shortage does not clothe the adjustment board with power to annul or modify zoning regulations. As noted, that is the function of the local legislative body."

For the reasons indicated, we think the refusal of the application was not arbitrary or unreasonable, and that the trial court should have dismissed the petition for mandamus. We express no opinion as to whether the petition would lie, in any event, in view of the provisions of sec. 519 of the enabling act, relating to appeals.

Order reversed, and petition dismissed, with costs.

Should a court of equity take into account a housing emergency when asked to enjoin two-family occupancy in a one-family dwelling zone? See City of San Diego v. Van Winkle, 69 Cal.App. 2d 237, 158 P.2d 774 (1945).

A zoning requirement of a minimum content of 14,000 cubic feet for single-family residences was invalidated in Frischkorn Const. Co. v. Lambert, 315 Mich. 556, 24 N.W.2d 209 (1946).

Most spot zoning is cut from the same cloth as piecemeal zoning. It is the device of so amending a comprehensive ordinance as to create "spot" non-conforming areas in larger zones laid out by the basic ordinance. It may destroy the integrity of comprehensive zoning if carried far enough.

PAGE v. CITY OF PORTLAND

Supreme Court of Oregon, 1946. 178 Or. 632, 165 P.2d 280.

Belt, Chief Justice. This is a suit to enjoin the enforcement of an amendatory zoning ordinance of the City of Portland purporting to reclassify two lots, owned by the defendant Hughes, so as to permit their use for business purposes. The lots were formerly in Zone I, or a residential district. If the ordinance is sustained, they will be changed to Zone III, or a business district. The plaintiffs, who are home-owners in the residential district and whose property is 100 feet north of the north line of the lots in question, challenge the validity of the ordinance, on the ground that it is an arbitrary and unreasonable exercise of police power. The ordinance is attacked on other grounds but, in view of the conclusion reached on the above issue, it will not be necessary to consider them. From a decree in favor of the plaintiffs that the ordinance is null and void, the defendants have appealed.

In 1924, the City of Portland enacted a comprehensive zoning ordinance dividing the municipality into four use districts, viz.:

Zone I, single family dwellings; Zone II, multiple dwellings; Zone III. business: and Zone IV, unrestricted. The ordinance is set forth in greater detail in Roman Catholic Archbishop of Diocese of Oregon v. Baker, 140 Or. 600, 15 P.2d 391. Its constitutionality, in its general scope, was sustained in Kroner v. City of Portland, 116 Or. 141, 240 P. 536. The lots comprise a tract of land 100 feet square located at the northeast corner of N.E. 33d Avenue and N.E. Knott Street, and is approximately in the center of an exclusive residential district about one mile in width and two miles in length. The district is bounded on the south by N.E. Broadway: on the west by N.E. 7th Avenue; on the north by N.E. Fremont: and on the east by N.E. Sandy Boulevard. Mrs. Hughes has owned these vacant lots for more than twenty years, and now proposes to sell them to the Safeway Stores, Inc., which contemplates the erection of a store building thereon for the purpose of engaging in retail grocery business.

On the southwest corner of this street intersection there is a drug store, grocery store, and meat market, all of which are nonconforming uses, authorized prior to the enactment of the original zoning ordinance. There is a residence on the northwest corner of the intersection; the lots on the southeast corner are vacant. Aside from the above-mentioned commercial enterprises there are no business houses within a quarter of a mile of the intersection in question. There are, however, business houses on the perimeter of this large district on Broadway and the eastern part of Fremont Street.

We have adverted to the business conducted on the southwest corner of the intersection to show the actual conditions but, since these business activities existed prior to the enactment of the original zoning ordinance and are therein defined as non-conforming uses, such cannot be considered relative to the question as to whether there has been any substantial change in the character of the district.

On October 24, 1940, the defendant, Mrs. Hughes, filed a petition for a change of zone and it was referred to the Planning Commission which later reported favorably thereon. On December 19, 1940, the petition was referred to the Commissioner of Public Works and was held by him, at the request of the petitioner, without action until May, 1942, when it was returned to the Council for consideration as a whole. The Council, in May of the same year, referred the petition again to the Planning Commission for further consideration and it reported that the petition should be denied. The Council, in July, laid the petition on the table. After a cooling period had expired, it was taken from the table in December, 1943, for further consideration. The ordinance, changing the zone, was finally passed by a ma-

jority vote on January 28, 1943. Mrs. Hughes during the course of the years filed three previous petitions to change the zone but all of them were denied. Indeed, ever since this residential district was created in 1924, it has been subjected to attempted invasion by commercial interests. The above recital of the history of this petition has not a great deal to do with the legal problems confronting the court, but it, at least, affords an interesting background.

The plaintiffs contend that the change of zone is an arbitrary and unreasonable exercise of the police power and has no substantial relation to the public welfare. They assert that permission to use these lots for commercial purposes is contrary to the purpose and spirit of the comprehensive zoning plan of the city and will result in arbitrary discrimination between property owners similarly situated. They also contend that this change of zone constitutes a taking of their property without process of law.

Defendants assert that the amendatory ordinance is a valid exercise of the police power and that it is not practicable or feasible to use the lots for residential purposes. They also contend that there has been a substantial change in the district adjacent to this street intersection and that the Council in the exercise of its wide discretion had the right thus to reclassify the property. Mrs. Hughes says in effect that to restrict the use of these lots to residential purposes is depriving her of any beneficial use thereof and constitutes a taking without due process of law.

Authority to zone or establish use districts was conferred upon the City of Portland and other municipalities by Chapter 300, Laws of Oregon for 1919, codified as § 95-2401, O.C.L.A., wherein the power thus delegated was, as stated therein, "for the public interest, health, comfort, convenience, preservation of the public peace, safety, morals, order and the public welfare." Establishing a residential district wherein commercial enterprises are excluded tends, without doubt, to promote the public welfare. We may assume that the Council, in creating the residential district in 1924, had in mind the purposes recited in the above Enabling Act. . . .

Zoning, however, is not static. It changes with changed conditions and the complexities of a modern age. If the rule were otherwise, there could be no progress. A regulation concerning the use of property might be considered reasonable today whereas, under different conditions, would be deemed so arbitrary and unreasonable as to amount to confiscation. Clearly, a city has the power to amend a zoning ordinance from time to time, if there has been a substantial change of conditions and the amend-

ment has some reasonable relation to the end sought to be attained, viz.: furtherance of the public interests. Village of Euclid v. Ambler Realty Co., supra; Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479; 138 A.L.R. 500 note. Police power must be exercised to promote the general welfare of the people at large, and not for the interests of any private group. Kroner v. Portland, supra; Berger v. City of Salem, 131 Or. 674, 284 P. 273; Phipps v. City of Chicago, 339 Ill. 315, 171 N.E. 289. Amendments to zoning ordinances should be made with caution and only when changing conditions clearly require amendment. Otherwise, the very purpose of zoning will be destroyed.

Property owners have no vested rights by reason of the enactment of an ordinance establishing use districts. No contractual relations are thereby created. Property is held subject to a valid exercise of the police power. We think, however, that a home owner has the right to rely on the rule of law that a classification made by ordinance will not be changed unless the change is required for the public good. Phipps v. City of Chicago, supra; Kennedy v. City of Evanston, 348 Ill. 426, 181 N.E. 312; Clifton Hills Realty Co. v. City of Cincinnati, 60 Ohio App. 443, 21 N.E. 2d 993. Certainly it cannot be made merely to accommodate private interests detrimental to the welfare of other property owners in the same district. As said in Kennedy v. City of Evanston, supra [348 III, 426, 181 N.E. 313], and which we approve: "If a general zoning ordinance is passed and persons buy property in a certain district, they have a right to rely upon the rule of law that the classification made in the general ordinance will not be changed unless the change is required for the public good."

While the City Council has wide discretion in enacting zoning ordinances, it has no right or authority to place restrictions on one person's property and by mere favor remove such restrictions from another's property. There must be reasonable ground or basis for the discrimination. White's Appeal, 85 Pa.Super. 502, affirmed 287 Pa. 259, 134 A. 409, 53 A.L.R. 1215; De Blasiis v. Bartell, 143 Pa.Super. 485, 18 A.2d 478. Whether there has been such a substantial change of conditions in a use district as to warrant the enactment of an amendatory zoning ordinance is primarily a question for the Council to determine, and its action, in reference thereto, will not be reviewed by the courts if the question is fairly debatable. It is only when the legislation is clearly arbitrary and unreasonable that a court will interfere. Zahn v. Board of Public Works, 274 U.S. 325, 47 S.Ct. 594, 71 L.Ed. 1074; Euclid v. Ambler, supra; Kroner v. City of Portland. supra; Metzenbaum on Law of Zoning 69.

Defendants' contention that there has been a substantial change in the character of the district is based solely upon the increase of traffic at the intersection of 33d Avenue and Knott Street. 33d Avenue is a through street and leads directly to the ship yards and a large army air base. Traffic count taken during the war period discloses heavy traffic over such street. There is a red stop flash signal at the intersection. It is a loading place for passenger busses. It is believed, however, that the traffic condition is to some extent due to war activities and therefore is of a temporary nature. Be that as it may, there are many streets in residential districts of the city where traffic is equally heavy, and still many fine homes are maintained. If residential districts can be changed merely on account of increased traffic, there would be no certainty or stability to zoning. We conclude that this evidence in itself affords no reasonable ground for enactment of the amendatory ordinance.

It is true that the lots are far more valuable for business than for residential purposes, but that in itself is not a sound reason for permitting the change of use of the property. That the property has great value for business purposes is a matter for consideration but it is not controlling. We must also bear in mind the depreciation in value of other property in the district caused by the removal of the restriction. That Mrs. Hughes may profit at her neighbors' expense does not appeal to equity. A different question would be presented if the restriction for residential use entirely deprived the owner of any beneficial use of the property. It is an exaggeration to say that these lots can never be used for residential purposes. There are only a few vacant lots in the district—seven of which are owned by the defendant Hughes and are in the same block as the lots in controversy. True, Mrs. Hughes had the right to refuse to sell her property for residential purposes, but if loss is sustained by reason of speculating on the removal of zoning restrictions, she has no just cause to complain.

Here, the Council have singled-out these lots in the heart of an exclusive residential district in its prime. The lots—excluding the non-conforming uses above mentioned—are entirely surrounded by the homes of people who desired to get away from the environment of business and industry. If this single intrusion of business is sustained, it will be merely the opening wedge for other commercial interests. It will result in a "commercial island" established in the center of one of the best residential districts in the City of Portland. We fail to see wherein the change has any substantial relation to the public welfare and therefore it is an arbitrary and unreasonable exercise of the police power. To sustain this amendatory ordinance would frustrate and destroy the purpose and plan of the original compre-

hensive zoning ordinance enacted in 1924, and under whose protection this district has developed.

Leahy v. Inspector of Buildings, 308 Mass. 128, 31 N.E.2d 436, 439, is particularly in point. In that case an amendatory zoning ordinance purported to change a single corner lot from a residential to a business district. The court said the effect of the ordinance "is to single out one lot located within what is essentially a residential district and impose restrictions upon this lot that are less onerous than those imposed upon the remaining portions of what is really the same zoning district." It was urged there, as here, that the traffic conditions adjacent to the lot changed the character of the district, but the court refused to sustain the validity of the ordinance. As a general rule, such so-called "spot zoning" is invalid. Strain v. Mims, 123 Conn. 275, 193 A. 754; Michigan-Lake Bldg. Corp. v. Hamilton, 340 Ill. 284, 172 N.E. 710; Mueller v. Hoffmeister Undertaking & Livery Co., 343 Mo. 430, 121 S.W.2d 775; Linden Methodist Episcopal Church v. Linden, 113 N.J.L. 188, 173 A. 593; Higbee v. Chicago B. & Q. R. Co., 235 Wis. 91, 292 N.W. 320, 323, 128 A.L.R. 734. Also see case in notes 149 A.L.R. 292, 128 A.L.R. 740. In Higbee v. Chicago, supra, the court sustained an ordinance permitting a public utility to erect a railway station in a residential district on the ground that it tended to promote the public welfare, but the court significantly said: "Doubtless an attempt to erect a manufacturing plant in a district zoned for and occupied by first class single residences only might be properly held to be 'spot zoning' and unreasonable and arbitrary." We do not wish to be understood as announcing a hard and fast rule that "spot zoning" is illegal. Obviously, the decision in each case depends upon its own partic-There are exceptional cases in which such zoning would be a valid exercise of the police power. Skalko v. City of Sunnyvale, 14 Cal.2d 213, 93 P.2d 93, is illustrative. That case involved property on the perimeter of a residential district. After the district was created, a large cannery was erected across the street. This factory had three thousand employees. Such business encroachment upon the district rendered the property of the plaintiff absolutely worthless for residential purposes. The enforcement of restrictions for residential use would, under such circumstances, have deprived the owner of any beneficial use of his property. It would have constituted a taking of his property without due process of law. The court, in the light of these facts. granted relief and held that the zoning ordinance as applied to such property was void. Also to the same effect see Eggebeen v. Sonnenburg, 239 Wis. 213, 1 N.W.2d 84, 138 A.L.R. 495.

Chayt v. Maryland Jockey Club, 179 Md. 390, 18 A.2d 856, is also relied upon by defendant-appellants, but we are not im-

pressed by it. In that case, the Chayts owned and occupied a home near the race track of the Maryland Jockey Club. Contiguous to the race track were several lots, also owned by the Jockey Club and which had been acquired by it at a time when no zoning restrictions were imposed. The lots were used only as a parking ground for automobiles. In 1938, the Jockey Club applied for a permit to construct a stable on the lots. Chavt filed suit to enjoin the granting of the application on the ground that the property was zoned as a residential district, and the court restrained the issuance of the permit. Chayt v. Board of Zoning Appeals, 177 Md. 426, 9 A.2d 747. In the meantime, an ordinance was passed reclassifying the property from residential to a "first commercial use district." [179 Md. 390, 18 A.2d 857.] The validity of the ordinance was challenged on the ground that it provided for "spot" zoning, but the court did not pass on such question since it treated the property "as if it had originally been classified as a first commercial use district." The court, in refusing to enjoin enforcement of the last above-mentioned ordinance. based its decision on the proposition that, since the amendatory ordinance put the properties in a lower classification, the Chayts had not been injured. The court, in our opinion, failed to apply the well-established principle that the validity of the amendatory ordinance depended on whether it tended to promote the general welfare. We think the protection of the American home is more important than that the "races must go on."

Having concluded that the evidence in this case discloses no reasonable ground for the exercise of the police power in enacting an amendatory ordinance, and that it has no substantial relation to the public welfare, it follows that the decree of the circuit court is affirmed. Plaintiffs are entitled to their costs and disbursements.²³

Skalko v. City of Sunnyvale, 14 Cal.2d 213, 93 P.2d (1939), to which reference was made in Page v. City of Portland, is probably the first instance of a change in conditions grounding a decision invalidating a zoning restriction. See 38 Mich.L.Rev. 434 (1940). As we have already observed, a change in conditions may so far defeat the purpose that a court of equity will not enforce so-called equitable servitudes or restrictions in deeds. See Notes 54 A.L.R. 812 (1928), 85 A.L.R. 985 (1933), 103 A.L.R. 734 (1936). Wherein do the considerations affecting zoning differ?

²³ See also Wilcox v. City of Pittsburgh, 121 F.2d 835 (C.C.A. 3rd, 1941). The opinion of Circuit Judge Clark contains a number of valuable references. The case is discussed in 30 Geo.L.J. 97 (1941) and 8 Univ. of Pitts.L.Rev. 69 (1941).

FORDHAM LOCAL GOV.U.C.B.-57

In the establishment and preservation of exclusive residence zones problems will arise as to what are permissible accessory uses. An amateur radio enthusiast had a \$10,000 radio receiving and transmitting installation, capable of world coverage, on his residential property in an area zoned for private dwellings and country estates. He owned two adjoining lots. His house was on lot 3 and he used lot 22 as a back yard. The apparatus included one thirty-foot and one sixty-foot antennae pole on lot 22. A suit by the village to enjoin the maintenance of those structures was won by the landowner on the theory that the use was permitted under a provision allowing "uses customarily incident" to a primary use for which an area was zoned. Two judges dissented; they considered such an elaborate installation a far cry from an ordinary incident to residential use. Village of St. Louis Park v. Casey, 218 Minn. 394, 16 N.W.2d 459 (1944).

If a zoning ordinance is silent with respect to its possible application to the enacting local unit will the unit's land uses be governed by it? An ordinance was applied, in Taber v. City of Benton Harbor, 280 Mich. 522, 274 N.W. 324 (1937), to exclude a municipal water tower from a residence zone. The "governmental versus proprietary" test was invoked and the proprietary label chosen. The problem is one of interpretation. If the measure is really comprehensive in character, why would it not cover public uses not expressly excepted? An express exemption of the enacting municipality was sustained in City of Cincinnati v. Wegehoft, 119 Ohio St. 136, 162 N.E. 389 (1928) (fire house in residence zone).

The fact that the true territorial base for planning and zoning is largely determined by social, economic and geographical factors, which do not conform to the lines of local government organization and authority, underlies much of the difficulty which confronts us in land use control. Urban growth is outward. In urban zoning the greatest potentialities for good or bad exist in the fringe areas. Yet, we are seriously hampered by a none-too-rational complex of local jurisdictions.

A recent case study of the fringe area of Flint, Michigan, is illuminating.

"There is neither planning nor zoning in the fringe area. There is an urgent need for both. The County Health Director calls planning and zoning the greatest needs for safeguarding of health in the fringe. The County Road Commission has just submitted a report to the Board of Supervisors citing postwar building in localities adjacent to the city and pointing out the proper place of planning in making future growth orderly. . . .

"The need for control of land use is apparent throughout the fringe. Vacant subdivisions stand idle and useless, while population strikes off in another direction. The northwest corner of the city illustrates this. A solid square mile of unsubdivided land at the corner, within the city, remains vacant. Yet since the 1920's a large subdivision has stood just across the border, largely vacant and forgotten." I. Harding Hughes, Jr., Local Government in the Fringe Area of Flint, Michigan 55 (mimeograph, Institute for Human Adjustment, University of Michigan, 1947).

Apart from such very influential practical factors as politics and private group interests, there are legal ways of putting authority on a footing as broad as the problem. The most thorough is to set up and endow with the appropriate authority a general-function unit of government which territorially covers the entire area affected. In some instances this might be done by city—county consolidation. In others simple extension of municipal boundaries might serve. In still others both annexation of unincorporated areas and consolidation or merger with peripheral municipalities might be indicated.

A second approach could be made by grant of extra-territorial powers to the principal municipality. While this method is widely used with respect to planning and land subdivision control, extraterritorial zoning, other than airport zoning, is not common. The most serious policy difficulty is that those primarily concerned are not represented in the government exercising control.

A third possibility calls for grants of zoning power to counties and towns or townships, either or both, and leaves us to hope that there would be enough cooperation to effect a coherent unified zoning pattern for an entire metropolitan community. The prospects of fulfillment are not bright. A small fringe municipality where land use is largely residential may prefer "dumping" of unwanted uses upon the principal city or outlying areas. A major object in separate incorporation, in the first place, may have been to establish an island not subject to community planning and action on a metropolitan scale. Dumping has been carried to the point of excluding churches, but exclusion of churches from residence zones has failed to stand the judicial test in Ohio. State ex rel. Synod of Ohio of United Lutheran Church in America v. Joseph, 139 Ohio St. 229, 39 N.E.2d 515 (1942). The same court has since upheld the exclusion of schools from residence zones. State ex rel. Hacharedi v. Baxter, 148 Ohio St. 221, 74 N.E.2d 242, (1947), appeal dismissed and certiorari denied 332 U.S. 827, 68 S.Ct. 209 (1947). (Schools are not likely material for dumping; the cited case bears more on the legal question of reasonableness of classification of uses).

Comprehensive zoning ordinances purport to control land uses in the older, settled areas of our cities. The character of those districts, however, is so firmly set that zoning which permits continuance of existing uses does not achieve very much. Retroactive zoning, designed to root out the intrenched undesirable uses, is very drastic and, although there is some support for it as a constitutional matter, scant resort has been made to the power. See State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929), certiorari denied 280 U.S. 556, 50 S.Ct. 16 (1929), and Noel, "Retroactive Zoning and Nuisances" 41 Col.L.Rev. 457 (1941).

It is the usual assumption that perhaps something can be done about scattered non-conforming uses in a restricted zone by a process of gradualism. The conventional theory is that existing non-conforming uses may be continued but may not be enlarged or extended. This sort of limitation is supposed to work toward the gradual elimination of the circumscribed uses. In practice it does not work out. "Amortization" over a period of years is more promising. See Note 9 U. of Chi.L.Rev. 477 (1942).

There are times when something substantial can be done in an older section of a community by rezoning. The obvious case is that of an area which may now be placed in a higher zoning classification by reason of the discontinuance of its former uses. It should be observed, at the same time, that rezoning may work the other way, as where time and actual developments have made it clear enough that there has been over-classification.

CASSEL REALTY CO. v. CITY OF OMAHA

Supreme Court of Nebraska, 1044. 144 Neb. 753, 14 N.W.2d 600.

YEAGER, JUSTICE. This is an action in equity originally instituted in the district court for Douglas county, Nebraska, by Cassel Realty Company, a corporation, plaintiff and appellant, against the city of Omaha, the individual members of the city commission of that city and the chief engineer of said city, defendants and appellees, the object and purpose of which is to have a zoning ordinance declared unconstitutional, null and void in its application to a certain tract of land belonging to plaintiff and to enjoin the enforcement of the ordinance in so far as it applies to the said tract of land.

The action was tried to the court whereupon decree was rendered denying the relief prayed by plaintiff. From this decree plaintiff has appealed.

As grounds for reversal plaintiff asserts that the court erred in finding that the ordinance in question was valid and constitutional; that the decree is contrary to and not sustained by the evidence; and that the decree is contrary to law.

Certain pertinent facts necessary to a proper understanding of the matter in controversy are the following: "Fifty-second street in Omaha, Nebraska, extends north and south. Maple street extends east and west. Military avenue east of Eiftysecond and south of Maple street extends from southeast to northwest. At or near the intersection of Fifty-second and Maple streets Military avenue enters and from that point westward about nine blocks coincides with Maple street. A double track street car line starting from downtown Omaha extends northwesterly over Military avenue to Fifty-second street, thence westerly over that part of Military avenue which is coincident with Maple street. Immediately west of Fifty-second street and north of Military avenue is a body of land, approximately 20 acres, owned by plaintiff. The west boundary is Fifty-fourth street and the northern Bedford avenue. For many years this land was used and occupied as an amusement park. It was known as Krug Park. Prior to the times involved in this action this use had been discontinued and nearly all of the buildings and structures thereon had been removed. The only important structures remaining were a two-story brick building in the extreme southeast corner and a large wooden building. The lower part of the brick building had been used as a saloon and the upper part as an apartment. The wooden building had been used as a dance pavilion. At the time of the commencement of this action it was being used as a roller skating rink. Across Fifty-second street to the east in an area the north and south length of which is two blocks is situated the Benson High School. To the north in the same area is a public grade school. A part of the grade school building is used for high school purposes. Over 1,500 pupils attend the high school. Pupils come to the school from all directions. Access from the west and northwest is along Military avenue past the land of plaintiff and across Fifty-second street, from the south across Military, and from the southwest along and across Military and Fifty-second or across Military and Fifty-second. Several blocks to the west of Fifty-second and Military beginning at about Fifty-ninth street is a business or commercial area. In this area are stores, shops, a bank and various other commercial enterprises. This is known as the business center of Benson. This center with its surrounding territory was at one time a separate municipal corporation. It has since been made a part of the metropolitan city of Omaha. This is not to say that there are no business or commercial establishments east of Fifty-ninth street. It appears that between Fifty-fourth and Fifty-ninth streets on the north side of Military somewhat more than half of the frontage is either occupied by residences or are vacant and the buildings on the remainder are devoted wholly or in part to some kind of business. On the north side of Military avenue from Fifty-second street to Fifty-fourth street, which is the property of the plaintiff, the condition has already been generally described. On the south side from Fifty-second to Fifty-ninth, about 600 feet are used in whole or in part for business, about 775 feet for residences, about 675 feet are vacant, 260 feet of which were formerly used as a used car sales and parking lot and on the rear of a space of 55 feet are two five-car garages.

In 1924, under authority of sections 14-401, 14-402 and 14-403, Comp.St.1929, which sections are now a part of the home rule charter, the city commission adopted an ordinance classifying and zoning the city of Omaha for the purpose of regulating and restricting the location of trades and industries and the location of buildings designed for specific uses and for the division of the city into districts.

By the terms of this ordinance an area 125 feet in depth on both sides of Military avenue along plaintiff's property and for many blocks in both directions was zoned for commercial use, that is, it was ordained that in this area could be constructed buildings for commercial use, with exceptions not necessary to be mentioned here. Use for single or multiple unit residences was not prohibited. The named classification was "C" or Commercial District.

This classification and this zoning continued in full force and effect until December 24, 1941, when the city commission enacted a new ordinance by the terms of which an area 125 feet in depth on both sides of Military avenue from Fifty-second street to Fifty-sixth street was reclassified and rezoned. The rezoning removed the area from "C" to the classification of "B", Residence District.

The new or "B" classification prohibits construction on the property of buildings to be used for commercial purposes. It permits residences, multiple dwellings, boarding and lodging houses, hotels, hospitals and clinics, educational, philanthropic and eleemosynary institutions, nurseries and greenhouses, private clubs, fraternities and lodges, and certain accessory buildings customarily incident to the specific uses allowed.

Plaintiff contends that this reclassification and rezoning ordinance is illegal, unconstitutional and void for the reason that it is unreasonable, arbitrary and confiscatory.

Section 14-401, Comp.St.1929, which is, as has been stated, a provision of the home rule charter of the city of Omaha, empowers the city commission to zone the city into districts and to restrict the use to which buildings in the particular districts may be put. Section 14-403 provides for the supplementing or changing of any such district.

The rezoning ordinance conformed to power granted to the city commission by the statute and the home rule charter. That the statute and charter is a valid exercise of the legislative prerogative under the police power can hardly be questioned. Also the exercise by the city commission of the power granted, if exercised reasonably and with due regard to rights of property and in the interest of public health, safety, morals and general welfare, is a proper prerogative. . . .

In State v. Withnell, 91 Neb. 101, 135 N.W. 376, 377, 40 L.R.A., N.S., 898, it was said: "By charter the state Legislature delegated power to the city of Omaha in the following terms: 'To make and enforce all police regulations for the good government, general welfare, health, safety and security of the city and the citizens thereof,' and 'to prescribe fire limits and regulate the erection of all buildings and other structures within the corporate limits,' and 'to define, regulate, suppress and prevent nuisances.' . . . Under the authority thus conferred, the city council, in passing the ordinance, obviously intended to exercise the police power of the city, and the courts should not interfere with its enforcement unless its unreasonableness, or the want of necessity for such a measure, is shown by satisfactory evidence." The case was one involving the prohibition of the erection of structures on real estate for a particular use.

The city of Omaha under its home rule charter has the power, by ordinance, to zone the city in the interest of public health, safety, morals and the general welfare. Any such act of the city must however not be unreasonable, discriminatory and arbitrary and it must bear some relationship to the purpose or purposes sought to be accomplished by the ordinance. . . .

It may be added here that a zoning ordinance may not operate retroactively to deprive a property owner of his previously vested rights, that is to say, a zoning ordinance could not deprive the owner of a use to which property was put before the enactment of the ordinance.

In Baker v. Somerville, supra [138 Neb. 466, 293 N.W. 327], it was said with regard to a zoning ordinance of the city of Omaha: "They acquired vested rights by contract and by expenditure of money before the city extended this regulation to their property. It is well-settled law that an ordinance cannot

operate retroactively to deprive them of their previously vested rights."

It follows therefore that the zoning ordinance before us cannot operate to take away any right which became vested prior to its adoption. . . .

In an action in court to enjoin the enforcement of a zoning ordinance on the ground that it is unreasonable, arbitrary and confiscatory it is necessary to indulge the presumption that the city commission in the enactment was in possession of the facts relating to the necessity for the zoning restriction and that its legislation related and responded to such necessitous condition.

Another rule requiring observance by the court in such actions is that if necessity under the police power could have justified the zoning ordinance the court must assume that it did. . . .

If then on the record presented there was evidence upon which the city commission could have said that the zoning ordinance in question was necessary in consideration of public health, safety, comfort or general welfare, it is beyond the province of the court to say that it is unreasonable, arbitrary or confiscatory even though it may depreciate in value business property or restrict the liberty of citizens in regard to ownership and use of property. . . .

It becomes necessary now to examine further the evidence to ascertain whether or not there were facts upon which the city commission could have concluded that this zoning was in the interest of public health, safety, comfort or general welfare.

We find nothing upon which to base a decision that the zoning was in the interest of public health.

On the matter of public safety we find that, as has already been pointed out, immediately to the east of the area involved is a public high school accommodating more than 1,500 pupils; that the major portion of these pupils must pass along the street in front of the property involved or cross at the street intersection directly to the east; that traffic on Military avenue and at the intersection is already heavy and that a hazardous condition exists; that additional commercial establishments in the area rezoned and particularly on the property of plaintiff would materially increase the hazard and increase the danger to school pupils going to and from this high school.

On the matter of comfort witnesses who live or have lived in or near the location involved testified to the discomfort occasioned by commercial enterprises already in the vicinity. At least one witness testified that the confusion from commercial enterprises was so great that in order to obtain sufficient quietude for sleep he was compelled to abandon his residence in the area at a very great sacrifice. These witnesses concluded that from an increase in commercial enterprises would flow added confusion.

On the matter of public morals which we take it is an element of general welfare, it was indicated in the evidence that commercial institutions such as would probably be established in this area would provide distractions for school pupils and loafing places which would bring about delinquencies in attendance upon classes. This conclusion depended upon observations of places already in close proximity and experiences at other schools.

Again under the general welfare witnesses, among whom were real estate men informed as to the elements affecting the value of residence properties, testified that a commercial area at this location would decrease the residence value of the surrounding area materially. Some said the value would be adversely affected for a distance of one block and some more than that. One said the effect would extend four or five blocks. Witnesses for plaintiff admitted that there would be an effect but that it would be slight and that it would not extend beyond the first block.

In this connection it may be well to note that the entire area in every direction for many blocks from the location involved here was zoned, used and being developed for residence purposes except the lands of plaintiff, the grounds used for school purposes and 125 feet along both sides of Military avenue or Maple street. Also it may be said that it was the contemplation of the plaintiff that all of its land except 125 feet or a slightly deeper area should be platted and subdivided for residence purposes.

The evidence discloses that necessity or convenience to the community does not require that commercial enterprises shall be established between Fifty-second and Fifty-sixth streets. To the west and in the Benson business section it sufficiently appears that the community needs and convenience may now be adequately met and that in this area are vacant locations available for additional commercial enterprises.

On the other side plaintiff makes two contentions which are substantially supported by evidence. The first is that its property to the depth of 125 feet along Military avenue is not suitable for residence property of any kind or character. The second is that if permitted to use the area for commercial purposes plaintiff could sell it for prices greatly in excess of prices that could be obtained for any other purpose.

As against this, witnesses for the defendants say that this frontage likely could be sold for higher prices for commercial purposes than any other but that if platted in conformity with the rezoning ordinance the loss on the frontage would be made

up in an increased value for residence purposes of plaintiff's land to the north.

This we think is a fair summary of the pertinent evidence bearing on this inquiry.

The law presumes and this court must therefore assume that the city commission was informed of these facts and that the rezoning ordinance`was enacted with reference to this information.

Was this evidence sufficient to a degree that the Omaha city commission could have said that the zoning ordinance was necessary in consideration of the public health, safety, comfort or general welfare? If it was of such quality then this court is bound by the action of the commission and may not hold the ordinance unreasonable, arbitrary and confiscatory and therefore void and unconstitutional. The finding of this court is an affirmative answer to the foregoing question.

The decree of the district court is affirmed. Affirmed.

In contrast with the principal case see 2700 Irving Park Building Corp. v. City of Chicago, 395 Ill. 138, 69 N.E.2d 827 (1946), discussed in 14 Univ. of Chi.L.Rev. 718 (1947) and 26 Chi.-Kent L.Rev. 89 (1947).

Administration and enforcement of a zoning ordinance are usually made the responsibility of the local officer who handles building permit applications. His title may be commissioner of buildings, inspector of buildings, or what not. The conventional plan provides a method of administrative review of determinations of the administrative officer. That review is a function of the zoning board of appeals (sometimes called board of review or board of adjustment). The board goes fully into the merits and may exercise all the powers of the officer in making such determination as ought to be made.

The board of appeals has another function of the greatest importance. Since a general ordinance cannot be so drawn as to take into account all of the special circumstances affecting the use of particular parcels of land, there should be a safety valve. It is possible, of course, to deal with special cases by ordinance but the prevailing opinion favors an administrative method of granting exceptions to the terms of zoning ordinances and variances from their application under a broadly-stated grant of power governed only by such general considerations as substantial justice, public safety and welfare. The courts, for the most part, have had little difficulty sustaining this broad grant of

"mitigating" or "dispensing" power by which relief may be afforded from the rigor of general rules in particular cases, but there are adverse decisions in Illinois and Maryland. Welton v. Hamilton, 344 Ill. 82, 176 N.E. 333 (1931); Sugar v. North Baltimore Methodist Protestant Church, 164 Md. 487, 165 A. 703 (1933). As a result of the Welton decision the Chicago zoning ordinance lays down certain rules to serve as guides in the allowance of variations and makes the function of a legislative matter to be performed by ordinance of the city council after public hearing by the board of appeals. The Welton decision was followed in Speroni v. Board of Appeals of City of Sterling, 368 Ill. 568, 15 N.E.2d 302 (1938).

COLATI v. JIROUT

Court of Appeals of Maryland, 1946. 186 Md. 652, 47 A.2d 613.

Delaplaine, Judge. On November 1, 1945, John W. Christopher, a building contractor, made application to the Buildings Engineer of Baltimore City for a permit to build for Silvestero Colati a two-story building on his corner lot at 2510 McElderry Street, for the purpose of a cafe and lunch room, after a one-story cafe building and garage now on the lot shall have been removed. The Buildings Engineer disapproved the application, and the contractor thereupon appealed to the Board of Zoning Appeals. At a public hearing on November 13, Mrs. Marie Jirout, who resides next to the cafe at 2512 McElderry Street, protested against the construction of a two-story building further back than the rear wall of her residence on the ground that it would cut off her air and light; but on November 14 the Board adopted a resolution approving the application.

Mrs. Jirout then filed a petition in the Baltimore City Court alleging that the action of the Board was illegal. Her landlords, John Jenesek and his wife, were subsequently granted permission to intervene in the case. Under paragraph 35 of the Baltimore City Zoning Ordinance (Ordinance 1247, approved March 31, 1931), any person aggrieved by a decision of the Board of Zoning Appeals may present a petition to the Baltimore City Court setting forth that the decision is illegal in whole or in part, and specifying the grounds of the illegality. The Court may reverse or affirm, wholly or in part, or may modify the decision brought up for review. On January 11, 1946, the Court passed an order modifying the decision of the Board by restraining the applicant for the permit from erecting any buildings on Colati's lot, from a point at the rear end of the wall of the residence at 2512 Mc-Elderry Street to the rear of the lot, to a height greater than

the first story of that residence. From that order Colati appealed to this Court.

It appears that the property in question is a non-conforming use in a residential use district. Paragraph 8(38) of the Baltimore City Zoning Ordinance prohibits the use of any building in a residential use district for the sale of alcohol or alcoholic drinks. But the Zoning Ordinance does not prevent the continuance of any non-conforming use existing at the time of the passage of the ordinance. Non-conforming buildings existing when the Zoning Ordinance went into effect are allowed to stand, and nonconforming uses are allowed to continue. Zoning seeks to stabilize and protect, not to destroy; it seeks to safeguard the future with anticipation that time will repair the mistakes of the past. However, paragraph 11 contains the following prohibition: "A non-conforming use may not be extended, except as hereafter provided, but the extension of a use in any portion of a building, which portion is now arranged or designed for such non-conforming use, shall not be deemed to be an extension of a non-conforming use." This Court holds that the Zoning Ordinance prohibits generally the extension of a non-conforming use except to the portion of the building designed for such use at the time of the passage of the ordinance, and that the stopping of expansion of a non-conforming use is not an arbitrary or unreasonable exercise of governmental power. Knox v. Mayor and City Council of Baltimore, 180 Md. 88, 96, 23 A.2d 15; Beyer v. Mayor and City Council of Baltimore, 182 Md. 444, 453, 34 A.2d 765.

The Zoning Ordinance, as amended by Ordinance 445, approved April 23, 1941, makes only one exception to the prohibition of paragraph 11 in dealing with residental use districts. This exception, found in paragraph 12(b), provides that the Board of Zoning Appeals, subject to the provisions of paragraph 32(j), may in its discretion in a specific case permit, where otherwise excluded or limited, "a use of the same classification, necessary or incidental to a non-conforming use" within 50 feet from such existing non-conforming use, provided that such 50-foot measurement shall not extend across a street. It is apparent that the Board's discretionary power to extend a non-conforming use horizontally does not apply to the pending case.

It is true that paragraph 32(g)3 of the Zoning Ordinance, enacted pursuant to the State Zoning Enabling Act, Acts of 1927, ch. 705, Code 1939, art. 66B, sec. 7, endows the Board of Zoning Appeals with discretion to authorize in any specific case such variance from the terms of the ordinance as may be necessary to avoid arbitrariness and so that the spirit of the ordinance shall be observed and substantial justice done. The only guide which the Mayor and City Council gave to the Board as to when it may

authorize a variance from the terms of the ordinance was, as stated in paragraph 33(b), when there are "practical difficulties or unnecessary hardships" in the way of carrying out the strict letter of the ordinance. In 1933 the Court of Appeals held that this grant of unlimited and unregulated discretion to an administrative board to set aside the ordinance in any case was an arbitrary and unlawful delegation of power. Jack Lewis, Inc. v. Mayor and City Council of Baltimore, 164 Md. 146, 164 A. 220; Sugar v. North Baltimore Methodist Protestant Church, 164 Md. 487, 495, 165 A. 703. On this appeal there is no necessity to discuss whether paragraph 32(g)3 has been brought fully within the bounds of constitutionality by the enactment of paragraph 32(j) of Ordinance 449, approved April 23, 1941, requiring the Board of Zoning Appeals to consider various factors before authorizing a variance. For the invalidity of paragraph 32(g)3 prior to the 1941 amendment did not affect the ordinance as a whole. We hold that zoning in general in a valid exercise of the police power of the State, and that a comprehensive zoning ordinance is constitutional.

It is evident that the spirit of the Baltimore City Zoning Ordinance is against the extension of non-conforming uses. generally accepted that a few non-conforming buildings and uses. allowed to continue as exceptions to the regulations in order to avoid injustice, will not be a substantial injury to the community if they are not allowed to multiply where they are harmful or improper; but non-conforming uses should not be perpetuated any longer than necessary, and the Zoning Board should make constant efforts to move them into the use districts where they properly belong. Bassett on Zoning, 106, 109. Even when a non-conforming building has been destroyed by act of God, the owner should not be allowed to rebuild as a matter of right without authority from statute or ordinance. Paragraph 38 of the Baltimore City Zoning Ordinance expressly provides that nothing contained in the ordinance shall prevent the restoration of a building or part thereof which has been destroyed by fire, wind, flood, explosion, act of God, or act of the public enemy: but it also states that in the event of such destruction nothing shall prevent the continuance of the use or part thereof "as such use existed at the time of such destruction of such building or part thereof."

Appellant's lot has a frontage of 14 feet, 3 inches, on McElderry Street, and a depth of 70 feet on Rose Street. The brick building now used as a cafe extends back 38 feet, and the garage in the rear has a depth of 32 feet. Thus the two buildings cover the entire area of the lot. The construction, for which appellant wants a permit, is not in any sense an alteration. He wants to

raze and remove his buildings and build anew on a much larger scale. He desires to transform a cafe or bar occupying slightly more than half the area of his lot to a cafe and lunch room which would have a floor space twice that of the entire area of the lot. It is conceded that the entire property has been used in the cafe business, and that the owner is protected from interference in that use; but, as the Supreme Court of New Jersey explained in De Vito v. Pearsall, 115 N.J.L. 323, 180 A. 202, 147 A.L.R. 170, where a factory or other non-conforming use is established on a lot in a residential district, that use should not be enlarged and extended without authority from statute or ordinance. For, while continuance of the original non-conforming building might be comparatively unobjectionable, a larger building might cause great damage to the district. Moreover, the manner in which the Baltimore City Zoning Ordinance limits the application of the principle of non-conforming use, and the restrictive language with which it authorizes restoration of a building in event of destruction, are strong manifestations of the intention of the Mayor and City Council that the power of the Board of Zoning Appeals to extend non-conforming uses shall be strictly construed.

For these reasons we hold that the Board of Zoning Appeals had no authority under the Zoning Ordinance to grant the permit to extend the non-conforming use as requested. No appeal, however, was taken from the extension allowed by the Court below, and the appellees do not complain of that extension and are not injured by it. On this appeal there is nothing before us in respect to the extension as granted and therefore the order of the Court will be affirmed. County Com'rs of Frederick County v. Page, 163 Md. 619, 164 A. 182.

Order affirmed, with costs.

In Louisiana the work of a zoning board of adjustment has been considered so fully judicial that a board may not appeal from a district court decision, on review of board action, any more than a judge may appeal when he is reversed by an intermediate appellate court. State ex rel. Bringhurst v. Zoning Board of Appeal and Adjustment, 198 La. 758, 4 So.2d 820 (1941); State ex rel. Hurley v. Zoning Board of Appeal and Adjustment, 198 La. 766, 4 So.2d 822 (1941). The Connecticut court has supported a directly contrary conclusion with the point that the board represents the public interest (as do many administrative tribunals). Rommell v. Walsh, 127 Conn. 16, 15 A. 2d 6 (1940).

Property-owner participation in the decision whether a particular use, such as a billboard or gasoline filling station, will be permitted within a restricted district is an old practice which has been employed rather freely in zoning. In 1912 the Supreme Court struck down an ordinance which required local officials to fix a building line upon application of the owners of two-thirds of the property upon one side of a square. Eubank v. City of Richmond, 226 U.S. 137, 33 S.Ct. 76. This was considered a denial of due process to non-participating owners since the decision was left to the arbitrary action of private hands. Five years later a Chicago ordinance proscribing billboards in a residential district subject to a dispensing power to be exercised by a certain majority of property owners in the area, was upheld by the Court. Thomas Cusack Co. v. City of Chicago, 242 U.S. 526, 37 S.Ct. 190 (1917). A distinction was made between power to enact a regulation and power to allow exceptions, even though in neither case was there a standard laid down to guide those exercising the power. Then came Washington ex rel. Seattle Title Trust Company, Trustee, v. Roberge, 278 U.S. 116, 49 S. Ct. 50 (1928). A Seattle zoning ordinance established a residence zone and provided that a philanthropic home for children or the aged should be permitted there with the written consent of the owners of two-thirds of the property within 400 feet of the proposed building. The Court, at the instance of a trustee-owner of a philanthropic home in the district, which proposed to construct a larger structure without effort to obtain property owners' consents, declared the ordinance invalid as a delegation of arbitrary power repugnant to due process. While the Court pretermitted the question whether absolute exclusion by ordinance would have been valid, the Cusack case was distinguished by reference to the character of use—billboards are more likely to be offensive. Is this consistent with the logic of the Cusack case? See H. C. Havighurst, "Property Owners' Consent Provisions in Zoning Ordinances" 36 W.Va.L.Q. 175 (1930). Is the Cusack distinction valid? Since the determination whether the particular use will be permitted is left ultimately to the uncontrolled discretion of private land owners in either case, are not both equally objectionable? The decisions are not uniform but there is substantial state court authority supporting the Cusack type of control. In state constitutional law the problem can be formulated simply as a question of delegation of legislative power. State ex rel. Standard Oil Co v. Combs, 129 Ohio St. 251, 194 N.E. 875 (1935).

What is to be said of property owners' consent provisions in the realm of policy? The possibility of abuse in the form of purchase of consents is obvious. A more vital consideration is the consistency of such a device with the broad objectives of planning and zoning. A zoning board of appeals in allowing variances is guided by the public interest and the spirit of the zoning ordinance. The property owner may respond to whatever selfish or other considerations he pleases. He is acting as an individual landowner and not as a member of the electorate participating in public action through political forms.

Ordinarily one specially damaged by the violation of a zoning ordinance has standing to enjoin the illegal use. Suppose, however, that the complaining party is seeking to protect a non-conforming use which is permitted only because it antedated the ordinance. In Bazinsky v. Kesbec, Inc., 259 App.Div. 467, 19 N.Y.S.2d 716 (1940), affirmed 286 N.Y.S. 655, 36 N.E.2d 694 (1941), relief was denied on the theory that plaintiff's interest was not of the sort the ordinance was designed to promote and protect.

METCALF v. LOS ANGELES COUNTY

Supreme Court of California, 1944. 24 Cal.2d 267, 148 P.2d 645.

GIBSON, CHIEF JUSTICE. This is an appeal from a judgment of dismissal in an action to enjoin the enforcement of a zoning ordinance of the county of Los Angeles insofar as that ordinance affects certain real property owned by plaintiffs.

Plaintiffs are the owners of five contiguous parcels of land aggregating about 831/2 acres, which, according to the allegations of the complaint, are unfitted for and have no appreciable value for any purpose other than use in the business of rock development and rock crushing. Plaintiff company, in addition to owning two of such parcels, has obtained options to purchase the real property of its coplaintiffs and intends to exercise the same "if, only, and when the [property] can legally be used for . . . rock development and rock crushing purposes . . . without interference . . . by defendant By the provisions of Ordinance No. 1494, New Series, of the County of Los Angeles, as amended by Ordinance No. 2903, New Series, plaintiffs' land is placed in an area zoned principally for residential and agricultural uses and its use for purposes of rock development and rock crushing is prohibited. Section 21 of that ordinance provides that an owner of property located within any zone established thereby may petition the Regional Planning Commission to have his property excepted from any particular restriction applicable to such property, that the commission shall cause an investigation to be made and file its report with the board of supervisors, and that the board may except such property from the restriction if it is satisfied that the exception is necessary for the preservation and enjoyment of any substantial property right of the petitioner and is not materially detrimental to public welfare or injurious to the other property in the vicinity. Under Ordinance No. 1454, New Series, it is unlawful for any person, firm, or corporation to establish, maintain or operate any rock quarry, sand or gravel pit, rock-crushing plant, or any apparatus for the manufacture or production of rock. sand or gravel upon plaintiffs' land without first obtaining a license and permit to do so. A license may be issued thereunder by the tax collector upon approval of the board of supervisors after due notice and hearing, and a permit may be issued by the chief engineer of the County Flood Control District upon conditions prescribed by the board of supervisors. None of the plaintiffs nor their predecessors in interest has ever applied for an exception pursuant to section 21 of Ordinance No. 1494 or for a license pursuant to Ordinance No. 1454.

It is alleged that defendant threatens to prevent plaintiffs from establishing a rock-crushing plant upon their premises and to compel them to restrict the use of their land to residential and agricultural uses. The action was brought on the theory that enforcement of Ordinance No. 1494 would unconstitutionally deprive plaintiffs of their property by inhibiting the use of their land for purposes for which it is particularly suited and for which it has a reasonably high value. At the trial the parties filed a stipulation of facts and waived findings and conclusions of law. The trial court sustained defendant's objection to the introduction of evidence by plaintiffs and dismissed the action on the ground that it was "prematurely brought in that none of the plaintiffs applied for an exception to the zoning ordinance attacked and none of the plaintiffs applied for a permit pursuant to Ordinance No. 1454, New Series, to establish or maintain a rock quarry."

A party aggrieved by the application of a statute or ordinance must invoke and exhaust the administrative remedies provided thereby before he may resort to the courts for relief. Alexander v. State Personnel Bd., 22 Cal.2d 198, 199, 137 P.2d 433; United States v. Superior Court, 19 Cal.2d 189, 194, 120 P.2d 26; Abelleira v. District Court of Appeals, 17 Cal.2d 280, 292, 109 P.2d 942, 132 A.L.R. 715; Gantner & Mattern Co. v. California E. Comm., 17 Cal.2d 314, 317, 109 P.2d 932; Teeter v. City of Los Angeles, 209 Cal. 685, 687, 290 P. 11. Defendant contends that plaintiffs failed to comply with this rule since they did not petition the Regional Planning Commission to have their property excepted from the restrictions of the challenged zoning ordinance pursuant to section 21 thereof. On the other hand.

plaintiffs contend that the doctrine of exhaustion of administrative remedies does not require them to follow the procedure prescribed by an ordinance which they alleged is void as to their property.

It should be noted at the outset that plaintiffs challenge the ordinance only insofar as it prevents a particular use of their property and do not otherwise question its validity. Where an ordinance is attacked as unconstitutional in its entirety, the authorities are divided as to the necessity of invoking administrative remedies prescribed by that ordinance. See Porter v. Investors' Syndicate, 286 U.S. 461, 468, 52 S.Ct. 617, 76 L.Ed. 1226; Hirsh v. Block, 50 App.D.C. 56, 267 F. 614, 618, 11 A.L.R. 1238; United States v. Superior Court, 19 Cal.2d 189, 195, 120 P.2d 26; Central Trust Co. v. City of Cincinnati, 62 Ohio App. 139, 23 N.E.2d 450, 452, 453. But where, as here, the ordinance is alleged to be unconstitutional only as applied to particular property, it has been held in other jurisdictions that before a party can make such an attack he must apply to the zoning authorities for an exception or variance under the act. Central Trust Co. v. City of Cincinnati, 62 Ohio App. 139, 23 N.E.2d 450; Taylor v. Haverford Township, 299 Pa. 402, 149 A. 639; see Downham v. City Council of Alexandria, D.C., 58 F.2d 784, 788; Dowsey v. Village of Kensington, 257 N.Y. 221, 229, 177 N.E. 427, 86 A.L.R. 642; cf. People v. Calvar Corporation, 286 N.Y. 419, 36 N.E.2d 644, 136 A.L.R. 1376; Payne v. Borough of Sea Bright, 14 N.J.Misc. 756, 187 A. 627. While there are no California cases directly in point, we are of the opinion that logic and the decisions of this court in analogous situations compel a like holding in this case. Cf. San Joaquin, etc., Irr. Co. v. Stanislaus County, 155 Cal. 21, 99 P. 365; Collier & Wallis, Ltd., v. Astor, 9 Cal.2d 202, 70 P.2d 171; Alexander v. State Personnel Bd., 22 Cal.2d 198, 137 P.2d 433.

A zoning ordinance places limitations upon the use of land within designated areas in accordance with the general policy adopted by the legislative body. The ordinance may be arbitrary and discriminatory in isolated cases as applied to certain property, and compliance therewith may present unusual difficulties in many other instances. But it is manifestly impracticable, if not impossible, to enumerate in the ordinance itself the varied factual situations to which the ordinance is not applicable because of constitutional objections or other special considerations. Consequently, almost every zoning ordinance, including the one under consideration, contains provisions whereby an owner may apply to an administrative body for permission to put his land to a nonconforming use. As stated in Thomas v. Board of Standards and Appeals, 263 App.Div. 352, 33 N.Y.S.2d 219, 230, "the

variances permitted by the Zoning Resolution are in the nat of safety valves to prevent the oppressive operation of the Z ing Regulations in particular instances. . . of all the litigation involving zoning regulations shows that insure the validity of the zoning plan for an entire municipal the legislative body must vest in some subordinate body power to grant variances in appropriate cases. . . . " ; also, Rubin v. Board of Directors, 16 Cal.2d 119, 124, 104 F 1041. In our opinion, until an application for a variance or ception is made and acted upon, the "legislative process remains incomplete." Porter v. Investors' Syndicate, 286 U.S. 461, 4 52 S.Ct. 617, 620, 76 L.Ed. 1226. This conclusion is strengthe by the fact that in excepting property from the restrictions Ordinance No. 1494 the board of supervisors may impose "s terms and conditions as said board may deem proper under circumstances." If the landowner is permitted to nore the procedure set forth in the ordinance whereby he n have his property excepted from the restrictions thereof, board's statutory power to impose terms and conditions up particular uses of property is circumvented. Equity's jurisc tion is limited by the existence of a tribunal created or gi additional powers for the very purpose of making factual del minations and alleviating the hardships of an oppressive stat as applied to the facts related by each complainant.

Plaintiffs argue, however, that in applying for an except under section 21 they would in legal effect be requesting a m favor from the zoning authorities upon the assumption and mission that the ordinance is valid, and that, therefore, application for an exception is not a remedy or, in any eve not an adequate remedy. The argument that an application an exception is not a remedy rests upon the assumption that means provided by an ordinance to redress or prevent an injuis not a remedy when the relief sought thereby may be gran or withheld in the discretion of the body to which application made. In San Joaquin, etc., Irrigation Co. v. Stanislaus Cour. 155 Cal. 21, 27, 99 P. 365, 367, however, this court stated that "remedy" to be exhausted before judicial relief might be tained includes or consists of the "opportunity to obtain adequate relief by application to a legislative or administrative municipal body, like a board of supervisors, with reference to the very matter of which [the parties] complain in an action in equity . .. " In the present case plaintiffs seek by judicial intervention to be relieved from the restrictions imposed by the zoning ordinance, and by the provisions of section 21 of that ordinance they are afforded an "opportunity to obtain adequate relief by application to a legislative or administrative municipal

body, like the board of supervisors, with reference to the very matter of which they complain in [this] action in equity." See, also, United States v. Superior Court, 19 Cal.2d 189, 196, 120 P.2d 26.

The fact that an exception might have been granted or denied in the discretion of the board of supervisors had application been made (Rubin v. Board of Directors, 16 Cal.2d 119, 126, 104 P.2d 1041; Regan v. Council of City of San Mateo, 42 Cal.App.2d 801, 806, 110 P.2d 95), does not render the remedy inadequate. See Alexander v. State Personnel Board, 22 Cal.2d 198, 200, 137 P.2d 433; Gantner & Mattern Co. v. California E. Comm., 17 Cal.2d 314, 318, 109 P.2d 932; Abelleira v. District Court of Appeal, 17 Cal.2d 280, 300, 301, 109 P.2d 942, 132 A.L.R. 715. Nor does the fact that an application for an exception admits the constitutionality of the ordinance render the remedy inadequate.

Had plaintiffs requested and been denied an exception, they would not have been barred from asserting in appropriate judicial proceedings that the zoning ordinance was unconstitutional as to their property. Rubin v. Board of Directors, 16 Cal.2d 119, 104 P.2d 1041; Skalko v. City of Sunnyvale, 14 Cal.2d 213, 93 P.2d 93.

Plaintiffs further contend that the rule relied upon by defendant is inequitable because it would operate to delay the legal assertion of their rights and to suspend the use of their land until their application had been acted upon. That contention constitutes an attack upon the entire doctrine of the exhaustion of administrative remedies. Cf. Collier & Wallis, Ltd., v. Astor, 9 Cal.2d 202, 206, 70 P.2d 171; United States v. Superior Court, 19 Cal.2d 189, 196, 120 P.2d 26.

The cases cited by plaintiffs do not support their position that an owner may attack the constitutionality of a zoning ordinance as applied to his property without first seeking to have such property excepted by the zoning authorities from the restrictions of the ordinance. In Rubin v. Board of Directors, 16 Cal.2d 119, 104 P.2d 1041, the landowner applied for and was denied a variance before he sought to challenge the constitutionality of the zoning ordinance in a judicial proceeding. Similarly, in Skalko v. City of Sunnyvale, 14 Cal.2d 213, 93 P.2d 93, plaintiff petitioned the city trustees for inclusion of his property in the business district before seeking a judicial declaration that a zoning ordinance placing his property in a residential district was void as to such property. In Matter of Application of Throop, 169 Cal. 93, 145 P. 1029; Bank of America, etc., v. Town of Atherton, 60 Cal.App.2d 268, 140 P.2d 678; and Del Fanta v. Sherman, 107 Cal.App. 746, 290 P. 1087, it does not appear that

the challenged ordinances provided for applications to the zoning authorities for exceptions or variances nor that the property owners failed to apply to the administrative bodies to have their property excepted from the restrictions of the ordinances, and cases are not authority for propositions not considered therein. Maguire v. Hibernia S. & L. Soc., 23 Cal.2d 719, 146 P.2d 673.

The judgment is affirmed.

SHENK, CURTIS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

No instance has been found of a zoning ordinance actually being given the effect of overriding restrictions in deeds which existed at the time of its enactment. There are frequent intimations in the cases that for an ordinance to be accorded such effect would render it an unconstitutional interference with vested interests. See Ludgate v. Somerville, 121 Or. 643, 256 P. 1043, 54 A.L.R. 837 (1927). The best discussion of the subject is that of M. T. Van Hecke, "Zoning Ordinances and Restrictions in Deeds" 37 Yale L.J. 407 (1928). It is clear that the private restrictions are unimpaired where the ordinance is more restric-Suppose, however, the ordinance is less restrictive, as where the private restriction excludes all but residential uses of a property which the ordinance now includes in a commercial zone? While, on a fair interpretation of the ordinance as a comprehensive measure, it would appear to override the restrictions, there is no indication that the courts would embrace such a view. In principle, the police power should be equal to the task of nullifying existing restrictions where the public interest dictates that course. Zoning may bear adversely on private restrictions without destroying them. Thus, in a Kentucky case, the fact that a certain area had been included in a business zone was considered, with other evidence, as making out such a change in conditions as to warrant refusal to enforce the restrictions. Goodwin Bros. v. Combs Lumber Co., 275 Ky. 114, 120 S.W.2d 1024 (1938).

Prospectively, private restrictions can be co-ordinated with zoning through control of subdivisional platting.

SECTION 4. LOCAL GOVERNMENT LAND ACQUISITION— EXCESS CONDEMNATION

We have seen that zoning is least effective in the older areas of a community which have, for better or worse, already assumed definite use patterns. Students of planning and land use control have been giving thought to a much more positive device-extensive public ownership of land which the operations of the private economy have left "undeveloped or so poorly developed as to be a social and economic burden on the community." See the well-documented Comment 52 Yale L.J. 634 at 636 n. (1943). Once the local unit became owner by purchase or expropriation it could use its proprietary position to replat and hold in reserve or sell with appropriate restrictions, all as the larger interests of the community might indicate. Proponents of this method of land use control recognize that there would be a problem of preventing or minimizing abuse and corruption. There is likely to be sharp conflict of opinion both as to the policy and the constitutionality of the device. The author of the above-cited comment is rather sanguine about the judicial response to the basic constitutional question of public purpose. The writer, on the other hand, would predict rough judicial sledding in the state courts. As yet the subject is academic.

Excess condemnation is much more narrowly confined. Any land development undertaking, private or public, is more or less directly affected by the condition of adjacent land and the character of its uses. The prime object of excess condemnation is to control adjacent property to the extent deemed appropriate to effectuate the purpose of a public development. If moreover, there is not excess taking the very effect of the taking of an appropriate area for the primary project may create a peripheral problem in the form of odd-shaped remnant lots. A secondary objective, which might be present, is the recouping, through improvement and sale of the excess land, of part of the project costs.

The state courts have been inclined toward the actual use theory of public use in eminent domain, instead of the broader notion of benefit. The result has been that excess condemnation statutes of several states have been declared unconstitutional. See Note 46 Col.L.Rev. 108, 111 (1946). This has led several states to provide express constitutional authority for excess condemnation.

Mo.Const. of 1945, Art. I, § 27:

"Acquisition of Excess Property by Eminent Domain—Disposition under Restrictions.—That in such manner and under

such limitations as may be provided by law, the state, or any county or city may acquire by eminent domain such property, or rights in property, in excess of that actually to be occupied by the public improvement or used in connection therewith, as may be reasonably necessary to effectuate the purposes intended, and may be vested with the fee simple title thereto, or the control of the use thereof, and may sell such excess property with such restrictions as shall be appropriate to preserve the improvements made."

See also Mass.Const., Articles of Amendment, Article XXXIX; Mich.Const. Art. XII, § 5; N.Y.Const., Art. I, § 7(e); Ohio Const., Art. XVIII, § 10.

The validity of the Ohio provision was brought in question in City of Cincinnati v. Vester, 281 U.S. 439, 50 S.Ct. 360 (1930), but the Court was able to dispose of the case on statutory grounds. It is not believed, however, that the due process of law clause of the Fourteenth Amendment places excess condemnation in serious jeopardy. The Vester case is discussed in an editorial note by Howard L. Bevis, 4 Univ. of Cin.L.Rev. 474 (1930).

SECTION 5. PUBLIC HOUSING—SLUM CLEARANCE AND BLIGHTED AREA REHABILITATION

Provision of institutional housing as well as subsistence for the indigent, particularly the aged poor, is a long-familiar responsibility of local government. Since World War I there has developed a condition which definitely appears to be casting government in an immensely greater and more important housing rôle. The cost of land and construction have been such that only the higher income groups have been provided adequate shelter. For many years we have steadily lost ground in meeting the shelter needs of our middle and lower income groups. It has been conservatively estimated that the housing shortage in 1945 was from 8 to 12 million units. P. M. Houser and A. J. Jaffe, "The Extent of the Housing Shortage" 12 Law & Contemp. Prob. 3, 13 (1947). World War II did not bring on this condition, but it did severely aggravate it. This is not the place to launch an inquiry into the complex factors which have been operative in the failure of our society to master its housing problem through the medium of private business. See generally the symposium on Housing in 12 Law & Contemp. Prob. No. 1 (1947), a well-documented note in 54 Yale L.J. 116 (1944), and the selected bibliography in the Municipal Year Book 1948, 288 et seq. (Int'l City Mgrs' Ass'n).

There is an impressive body of opinion, at all events, that, barring phenomenal changes in the construction industry, government subsidy is necessary to bridge the gap between private ability to pay for housing and the cost of that necessity.

Anent the present state of affairs it has been said: "By any ordinary economic test the construction industry stands condemned. In a world in which most costs and prices are declining, construction costs and prices are maintained and driven higher. In a world in which mass production and consumption have become common place, the construction industry operates on a basis of petty production and has never succeeded in achieving mass consumption. The industry has so priced itself out of the market that we now take for granted the necessity of Federal subsidy in building residences for between one-fourth and one-half of our population. Construction methods are notoriously antiquated. Handicraft persists where machine methods are known. Smallscale purchase and sale and small-scale, localized operation continue where a larger-scale endeavor would clearly be economical. Restrictive practices and high price policies are more prevalent than in any other industrial field. Seasonal operation is greater than the weather requires. Idle resources are conspicuous even in good times and mass unemployment is a recurrent phenomenon." Corwin D. Edwards "Legal Requirements that Building Contractors be Licensed" 12 Law & Contemp. Prob. 76, 93 (1947).

In the past resort has been had to such stimulants to home ownership as homestead exemption from property taxation and the placing of homesteads in a favored class under a classified property tax system. For references to homestead exemption provisions see Edwin Yourman, "Some Legal Aspects of Cooperative Housing" 12 Law & Contemp.Prob. 126, 139 n. 44 (1947). An instance of favored classification is to be found in W.Va.Const. Art. X, § 1, as amended in 1932. Such measures bear but lightly upon the present housing crisis.

The Federal Government has taken the initiative in developing public housing. For all practical purposes public housing and the program of the Federal Public Housing Authority have been synonymous. Federal sponsorship was born in PWA in the early 1930s and developed in FPHA (originally United States Housing Authority) after the enactment of the United States Housing Act in 1937. While there has been some direct federal construction of public housing, particularly PWA housing and defense housing during World War II, the basic FPHA plan has called for local construction and operation with federal assistance. Instead of employing the established general function units the authority idea was seized upon. Some forty states enacted appropriate enabling legislation with respect to the creation of one or more

emption.

types of housing authorities, (municipal, county or regional) with power to finance, construct, maintain and operate housing projects. And, with the assistance of FPHA counsel, test suits were prosecuted in over half the states to lay at rest any doubts on constitutionality. While special constitutional issues were presented in some of these cases the questions of universal interest were: (1) Would the purpose be public in the sense that local government might undertake it; (2) would the purpose be public in the eminent domain sense; and (3) could housing properties be granted tax exemption. In only one state, Ohio, was an unfavorable decision rendered. In Columbus Metropolitan Housing Authority v. Thatcher, 140 Ohio St. 38, 42 N.E.2d 437 (1942), tax exemption was denied on the theory that once a project were completed and the facilities occupied the use would not be exclusively public in the sense of the state constitutional provision governing exemption of public property. The case has been criticized by Myres S. McDougal and Addison A. Mueller, "Public Purpose in Public Housing: An Anachronism Reburied" 52 Yale L.J. 42 (1942). The Ohio court subsequently reached a like conclu-

sion as to a federal housing property leased to an Ohio housing authority, only to be reversed by the Supreme Court of the United States. City of Cleveland v. United States, 323 U.S. 329, 65 S.Ct. 280 (1945). The Court had no difficulty in sustaining, under the general welfare clause, the use of federal funds and credits for such a project. Congress had effectually cloaked it with tax ex-

The FPHA plan is tied to slum clearance. That agency exacts of co-operating local units not only an initial showing of need for low-income housing but also retirement from use of substandard slum-type dwelling units substantially equal in number to the new units. Public housing projects have quite commonly, but not universally, been constructed on slum-cleared sites. In some of the test cases it was intimated that but for the slum clearance factor public purpose might not have been made out. See, for example, Allydonn Realty Corporation v. Holyoke Housing Authority, 304 Mass. 288, 23 N.E.2d 665 (1939). It is not evident why this must needs be so. One can readily appreciate the facility with which courts can apply nuisance abatement concepts to slum clearance. But we are not confined to such notions. If a substantial segment of the population can afford to pay only a part of what decent housing costs why may not the responsibility to make up the difference be socialized as a burden of government as readily as relief of widespread unemployment or provision for the destitute?

Very briefly, the FPHA plan of financing involves long-term local housing authority borrowing by the issuance of obligations

supported by the income of a housing project plus annual FPHA contributions. The federal agency will lend, on such obligations up to ninety per centum of project costs. Local initiative must produce a minimum of ten per centum. The local authority is free to sell its bonds in the market if able to do so to advantage. It should be borne in mind that the borrower is a separate public corporation without taxing power and its bonds are not debts within the meaning of constitutional and statutory debt limitations applicable to general function local units. The annual federal contribution is matched in part by tax exemption of the project. The two combined are intended to make up the difference between all charges on the project (including operation and maintenance and debt service) and income from rentals tailored to low incomes. See Maxwell Tretter, "Public Housing Finance" 54 Harv.L.Rev. 1325 (1941).

Provision for equivalent elimination of slum dwellings may be made by contract with the municipality or other general function unit in which the project is located. To assure needed interlocal teamwork the FPHA requires a cooperation agreement between the local authority and the general function local unit concerned by which the latter agrees not to impose any taxes or charges on the project, other than an approved service charge for local public services, and to make such street and zoning changes as might be necessary in the development of the project. Such a contract has been enforced by mandamus. State ex rel. Great Falls Housing Authority v. City of Great Falls, 110 Mont. 318, 100 P.2d 915 (1940); discussed in Note 50 Yale L.J. 525 (1941).

While the zoning technique is of great importance in the new and growing areas of urban communities, it is not adapted to the rehabilitation of the foci of social and economic blight to be found in the older parts of all our larger cities. Outright retroactive zoning is too drastic, even if constitutional. Neither it nor gradual elimination of non-conforming uses, moreover, is addressed to the positive phase of rehabilitation. Cf. Note 9 U. of Chi.L.Rev. 477 (1942). What is involved there is removal of the fester, relocation of displaced residents and planned redevelopment of the cleared district. Since 1940 a new technique has been brought to bear on this problem. It is called urban redevelopment.

New York led the way by adopting an urban redevelopment corporation law in 1941. The scheme of that and other early development acts was to effect land assembly and clearance as well as rehabilitation through regulated private redevelopment corporations. The job could not be done by attacking particular lots and structures separately. "Land assembly," the acquisition

of ownership of all land and structures in a given blighted district, was necessary. Crucial in this phase of the process was the power of eminent domain. The grant of that power to private redevelopment corporations has been upheld in Illinois and New York. Zurn v. City of Chicago, 389 Ill. 114, 59 N.E.2d 18 (1945); Murray v. La Guardia, 291 N.Y. 320, 52 N.E.2d 884 (1943). It is to be noted that Section 2 of Article 18 of the Constitution of New York, as amended in 1938, authorizes the grant of the power of eminent domain to regulated private corporations in aid of slum clearance and redevelopment.

In 1945 a number of states enacted enabling legislation which effected an important shift from the original New York redevelopment scheme. By 1948 twenty-five states had urban redevelopment statutes. These laws place responsibility for land assembly and clearance upon local government and leave redevelopment to private enterprise. For an analysis of redevelopment legislation see Comparative Digest of the Principal Provisions of State Urban Redevelopment Legislation (National Housing Agency, Office of the General Counsel, 1947), and The Municipal Year Book 1946, 311 et seq. (Int'l City Mgrs' Ass'n).

The thorniest problem confronted under both the older and newer plans arises from the disparity between the cost of land assembly and clearance and the use value to the redevelopers. The former is likely to be considerably greater. Private capital will hardly be ventured if it must absorb this difference. Here, again, government subsidy enters the picture. The newer type statute is better adapted to a subsidy policy. A responsible local unit might acquire and clear a district and then turn it over to a redevelopment corporation at its use value. The limited financial resources of local government do not give strong promise that local units could bear the burden. In short, if the scheme is to work, is it not likely that the federal government will have to provide a large share of the funds for the subsidy or, at a minimum, lend federal credit to local units assuming the burden of the write-down. Federal aid is provided by the District of Columbia Redevelopment Act of 1945. (Public Law 592, 79th Cong., 2d Sess., approved August 2, 1946). Title VI of the Wagner-Ellender-Taft Bill (S.1592) was designed to provide financial assistance to local units for land assembly and clear-The bill passed the Senate but was still in committee in the House when that body adjourned sine die on August 2, 1946. The bill was re-introduced in the Eightieth Congress but failed of enactment. Congress turned its back on public housing. It is obvious that the subsidy provided by such a measure would operate to the advantage of the owners of slum property and that factor has provoked criticism.

In England, where community planning and redevelopment must contend with the important additional factor of extensive war damage, the problem has been attacked as a national responsibility. Under a series of Town and Country Planning Acts, enacted from 1943 to 1947, a separate ministry of planning serves as a central authority charged with effectuating a national policy. The English approach is to relocate excess population and industry from damaged or blighted areas and then redevelop those areas as appropriate. It goes well beyond the primary American emphasis on housing. The national government provides financial assistance by paying for limited periods the interest on local debt incurred for the purchase of land.

Under our system positive governmental action is for the state and local governments. The Federal Government can provide data, advice and funds. Without federal subsidy or credit accomplishments in redevelopment are likely to continue to be meagre. In New York City a large insurance company, operating through redevelopment subsidiaries, has carried on two major projects, Stuyvesant Town and Riverton, which, together, will house about 10,000 families. Beyond that, blueprints are probably our most concrete manifestation of urban redevelopment. See Ruth G. Weintraub and Rosalind Tough, "Redevelopment Without Plan" 37 Nat.Mun.Rev. 364 (1948).

BELOVSKY v. REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA

Supreme Court of Pennsylvania, 1947. 357 Pa. 329, 54 A.2d 277.

HORACE STERN, JUSTICE. Plaintiff's bill in equity, filed by her as a taxpayer of the City of Philadelphia, challenges the constitutionality of the "Urban Redevelopment Law" of May 24, 1945, P.L. 991, 35 P.S. § 1701 et seq., the "Redevelopment Cooperation Law" of May 24, 1945, P.L. 982, 35 P.S. § 1741 et seg., and the Act of May 24, 1945, P.L. 977, 40 P.S. §§ 504-506, which amended the Act of May 17, 1921, P.L. 682, by authorizing life insurance companies to invest in city housing projects in redevelopment areas. The bill seeks an injunction to prevent the Redevelopment Authority of the City of Philadelphia from entering upon any activities pursuant to these statutes, and the City of Philadelphia and its officers from appropriating any public moneys to the Authority and from entering into any agreement with it. The Commonwealth of Pennsylvania intervened in the litigation, as have also the City of Pittsburgh and a great number of civic, philanthropic, social and business organizations of the City of Philadelphia. The learned court below dismissed the bill.

The Urban Redevelopment Law determines and declares as a matter of legislative finding—(a) "That there exist in urban communities in this Commonwealth areas which have become blighted because of the unsafe, unsanitary, inadequate or overcrowded condition of the dwellings therein, or because of inadequate planning of the area, or excessive land coverage by the buildings thereon, or the lack of proper light and air and open space, or because of the defective design and arrangement of the buildings thereon, or faulty street or lot layout, or economically or socially undesirable land uses. (b) That such conditions or a combination of some or all of them have and will continue to result in making such areas economic or social liabilities, harmful to the social and economic well-being of the entire communities in which they exist, depreciating values therein, reducing tax revenues, and thereby depreciating further the general community-wide values. (c) That the foregoing conditions are beyond remedy or control by regulatory processes and cannot be effectively dealt with by private enterprise under existing law without the additional aids herein granted, and that such conditions exist chiefly in areas which are so subdivided into small parcels and in divided ownerships that their assembly for purposes of clearance, replanning and redevelopment is difficult and impossible without the effective public power of eminent domain. (d) That the acquisition and sound replanning and redevelopment of such areas in accordance with sound and approved plans for their redevelopment will promote the public health, safety, convenience and welfare." Therefore the act declares it to be "the policy of the Commonwealth of Pennsylvania to promote the health, safety and welfare of the inhabitants thereof by the creation of bodies corporate and politic to be known as Redevelopment Authorities, which shall exist and operate for the public purposes of acquiring and replanning such areas and of holding or disposing of them in such manner that they shall become available for economically and socially sound redevelopment. Such purposes are hereby declared to be public uses for which public money may be spent, and private property may be acquired by the exercise of the power of eminent domain."

Although such legislative declarations are subject to judicial review they are entitled to a prima facie acceptance of their correctness: Dornan v. Philadelphia Housing Authority, 331 Pa. 209, 222, 200 A. 834, 841.

The act creates for each city and county of the Commonwealth a so-called "Redevelopment Authority," which is not in any way to be deemed to be an instrumentality of the city or county or engaged in the performance of a municipal function. No Authority shall transact business or otherwise become operative un-

til the governing body ²⁴ of the city or county shall find and declare that there is need for it to function; upon such declaration being made the mayor or the board of county commissioners, as the case may be, shall appoint the members of the Authority. An Authority "shall constitute a public body, corporate and politic, exercising public powers of the Commonwealth as an agency thereof," and shall have all the powers necessary or appropriate to effectuate the purposes and provisions of the act—among them the power to acquire property whether by purchase, gift or eminent domain; to own, hold, improve and manage such property; to sell, lease or otherwise transfer, subject to approval by the local governing body, any development area, either as an entirety to a single redeveloper ²⁵ or in parts to several redevelopers; and to borrow from private lenders or from the State or Federal Government funds necessary for its operation and work.

The scheme of redevelopment 26 proceeds under the act as follows: The local planning commission makes a "redevelopment area plan" designating an area which it finds to be blighted because of the existence of the conditions enumerated in the act and containing recommendations for the redevelopment of such area. The plan must set forth the boundaries of the area, information concerning its buildings and population, a statement of the existing uses of the real property therein, a statement of the proposed uses following redevelopment, a statement of the proposed changes in zoning ordinances and street layouts, an estimate of the cost of acquisition of the area and other costs necessary to prepare it for redevelopment, and a statement of such continuing controls as may be deemed necessary to accomplish the purposes of the act. Thereupon the Authority prepares a "redevelopment proposal" for the redevelopment of all or part of such area, including the proposed redevelopment contract and the selection of the redeveloper, and submits this proposal to the planning commission for review. The proposal, together with the planning commission's recommendations thereon, are then certified to the governing body, which, after a public hearing, approves or rejects the proposal and the redevelopment contract; in the event

²⁴ [Footnotes renumbered]. "Governing Body" is defined as being "In the case of a city, the city council or other legislative body thereof, and in the case of a county, the board of county commissioners or other legislative body thereof."

²⁵ "Redeveloper" is defined as "Any individual, partnership or public or private corporation that shall enter or propose to enter into a contract with an Authority for the redevelopment of an area under the provisions of this act."

²⁶ "Redevelopment" is defined as "The acquisition, replanning, clearance, rehabilitation or rebuilding of an area for residential, recreational, commercial, industrial or other purposes, including the provision of streets, parks, recreational areas and other open spaces."

of the proposal being approved the Authority is empowered to execute the contract and to take such action as may be necessary to carry it out. The contract provides for the amount of the consideration to be paid by the redeveloper to the Authority and for the necessary continuing controls. Any deed or lease to a redeveloper in furtherance of the contract must contain such provisions as the Authority may deem desirable to run with the land in order to effectuate the purposes of the act. The Authority is granted the right of eminent domain and title to any property thus acquired shall be an absolute or fee simple title unless a lesser title shall be designated in the eminent domain proceedings. The Authority may issue bonds for any of its corporate purposes, the principal and interest of which are payable from its revenues generally; such bonds may be secured by a pledge of any of its revenues or by a mortgage of any of its property; the bonds and the income therefrom shall at all times be free from taxation for State or local purposes. Neither the bonds nor any other obligations of the Authority shall be a debt of any municipality 27 or of the Commonwealth, nor shall any municipality or the Commonwealth nor any revenues or any property of any municipality or of the Commonwealth be liable therefor.

The "Redevelopment Cooperation Law" provides that the city council or the county commissioners, as the case may be, may make such appropriations to an Authority as are deemed necessary to assist the Authority in carrying out its public purposes. Any State public body 28 located in whole or in part within the field of operation of a Redevelopment Authority is granted the power from time to time to lend or donate money to the Authority.

Legislation similar to these Pennsylvania statutes has been adopted in 23 other States.

Pursuant to the authority given in the Urban Redevelopment Law the Council of the City of Philadelphia enacted an ordinance, on September 21, 1945, which stated that there existed in the city areas which had become blighted by reason of the conditions described in the Urban Redevelopment Law; the council therefore found and declared that there was need for a Redevelopment Authority to function within the city. Accordingly such an Authority was organized and subsequently the council made an appropriation to it for administrative expenses during the year 1946 and at the time of the hearing of this case in the court below had

^{27 &}quot;Municipality" is defined as "Any county, city, borough or township."

^{28 &}quot;State Public Body" is defined as "Any city, borough, town, township, county, municipal corporation, other subdivision, board, commission, housing authority or public body of this Commonwealth."

under consideration the making of another appropriation for the year 1947. A Redevelopment Authority has been similarly created and organized in and for the City of Pittsburgh.

The present attack upon the constitutionality of the Urban Redevelopment Law centers largely upon the grant therein made to the Redevelopment Authorities of the power to exercise the right of eminent domain. It is contended that the taking of property under the act is not for a public purpose and therefore cannot constitutionally be effected by resort to the power of eminent domain.

Doran v. Philadelphia Housing Authority, 331 Pa. 209, 200 A. 834, may be regarded as the prototype of the present case since all the arguments now presented on this subject were there fully considered. The Urban Redevelopment Law closely parallels the provisions of the "Housing Authorities Law" of May 28, 1937, P. L. 955, 35 P.S. § 1541 et seq., with which the Dornan case was concerned. The fundamental purpose of both these acts was the same, namely, the clearance of slum areas, although the Housing Authorities Law aimed more particularly at the elimination of undesirable dwelling houses whereas the Urban Redevelopment Law is not so restricted. But the Housing Authorities Law had an important additional objective in that, as ancillary to the slum clearances, there were to be provided "decent, safe, and sanitary urban or rural dwellings, apartments or other living accommodations for persons of low income"; these were to be constructed and acquired by the Housing Authorities and leased out by them to the class of tenants for whose use such accommodations were designed. In the case of the Urban Redevelopment Law the operation of clearing and rehabilitating the "slums," now called "blighted areas", is not to be followed by a continuing ownership of properties by the Redevelopment Authorities for any such further and ulterior social-welfare purpose as that of providing low rental homes for persons in moderate circumstances. In this additional feature of the Housing Authorities Law there was implicit the modern recognition of an enlarged social function of government which called for an advance over previous legal conceptions of what constitutes a public use justifying the exercise of the power of eminent domain, but this court sustained the constitutionality of that act, and the courts of numerous other States have, without exception, upheld similar legislation. In the case of the Urban Redevelopment Law, therefore, the justification of the grant of the power of eminent domain is even clearer than in the case of the Housing Authorities Law, there being in the present act only the one major purpose of the elimination and rehabilitation of the blighted sections of our municipalities, and that purpose certainly falls within any conception of "public use" for

nothing can be more beneficial to the community as a whole than the clearance and reconstruction of those sub-standard areas which are characterized by the evils described in the Urban Redevelopment Law. It has long been clear that those evils cannot be eradicated merely by such measures, however admirable in themselves, as tenement-house laws, zoning laws and building codes and regulations; these deal only with future construction, not with presently existing conditions. Nor, as experience has shown, is private enterprise adequate for the purpose. The legislature has therefore concluded—and the wisdom of its conclusion is for it alone—that public aid must accompany private initiative if the desired results are to be obtained. The great cities of Europe have been improved and largely rebuilt through the expenditure of public moneys by the edicts of monarchs and dictators: if the governing bodies in our own democratic Commonwealth are to be held unable, under our constitution, to plan and support such reconstruction projects, our cities must continue to be marred by areas which are focal centers of disease, constitute pernicious environments for the young and, while contributing little to the tax income of the municipality, consume an excessive proportion of its revenues because of the extra services required for police, fire and other forms of protection.

One of the objections urged against the constitutionality of the Urban Redevelopment Act is the feature of the "redevelopment project" 29 which contemplates the sale by the Authority of the property involved in the redevelopment, it being claimed that thereby the final result of the operation is to take property from one or more individuals and give it to another or others. Nothing. of course, is better settled than that property cannot be taken by government without the owner's consent for the mere purpose of devoting it to the private use of another, even though there be involved in the transaction an incidental benefit to the public. But plaintiff misconceives the nature and extent of the public purpose which is the object of this legislation. That purpose, as before pointed out, is not one requiring a continuing ownership of the property as it is in the case of the Housing Authorities Law in order to carry out the full purpose of that act, but is directed solely to the clearance, reconstruction and rehabilitation of the blighted area, and after that is accomplished the public purpose is completely realized. When, therefore, the need for public ownership has terminated, it is proper that the land be re-transferred to private ownership, subject only to such restrictions and controls as are necessary to effectuate the purposes of the act. It is

^{29 &}quot;Redevelopment Project" is defined as "A project undertaken by a redeveloper under a contract with an Authority in accordance with the provisions of this act."

not the object of the statute to transfer property from one individual to another: such transfers, so far as they may actually occur, are purely incidental to the accomplishment of the real or fundamental purpose. However, it is of passing interest to note that there are some cases in which the constitutionality of statutes was sustained the very object of which was to effect such transfers of ownership. Thus in State ex rel. State Reclamation Board v. Clausen. 110 Wash. 525. 188 P. 538. 14 A.L.R. 1133. it was held to be a valid public purpose for the State to purchase and improve tracts of undeveloped agricultural lands and subdivide and dispose of them to individual farmers and settlers. And in People of Puerto Rico v. Eastern Sugar Associates, 1 Cir., 156 F.2d 316, certiorari denied 67 S.Ct. 190, it was held that the prohibition against taking property without due process of law was not violated by an act which, in order to establish a scheme of agrarian reform, authorized the condemnation of land by a Land Authority for the sole purpose of subdividing and disposing of it to individuals for homesteads and farms. True, it was held in Pennsylvania Mutual Life Insurance Co. v. City of Philadelphia, 242 Pa. 47, 88 A. 904, 49 L.R.A., N.S., 1062, that an act was unconstitutional which authorized cities to acquire properties adjoining a parkway and then resell them subject to building restrictions, but this was because the only purpose was to beautify the parkway, and aesthetic objectives are not sufficient to justify the exercise of the power of eminent domain. In the Housing Authorities Law the Authorities were given the power to sell. exchange, transfer or assign any property to any person, firm or corporation, public or private, when the Authority determined that such property was not needed for the purposes of the act, and we sustained the validity of that provision: Dornan v. Philadelphia Housing Authority, 331 Pa. 209, 227, 228, 200 A. 834, 843. Indeed, so far from it being legally objectionable that property acquired by eminent domain be resold or re-transferred to private individuals after the purpose of the taking is accomplished, the law actually requires that property be taken by eminent domain only to the extent reasonably required for the purpose for which the power is exercised (Bachner v. Pittsburgh, 339 Pa. 535, 539, 15 A.2d 363, 365) and upon cessation of the public use the public ownership is properly discontinued. Nor does the taking lose its public character merely because there may exist in the operation some feature of private gain, for if the public good is enhanced it is immaterial that a private interest also may be benefited.

As is not unusual when the constitutionality of an important statute is assailed, attacks are here made upon alleged violations of a considerable number of constitutional provisions, possibly in the hope that a stray shot may find its way to some vital target.

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One of these assaults is directed against an alleged delegation of legislative powers contrary to the provision of Article II, section 1 of the Constitution, P.S., it being claimed that insufficient standards are set up in the statute to guide the Authority in exercising the powers with which it is vested. The fact is, however, that the act contains as definite a description of what constitutes a blighted area as it is reasonably possible to express; in regard to such factors as the selection and the size of the areas to be redeveloped, the costs involved, and the exact form which the redevelopment in any particular case is to take, it was obviously impossible for the legislature to make detailed provisions or blueprints in advance for each operation. It is to be borne in mind that all the powers given to the Authority in regard to the making of the redevelopment proposal, including the redevelopment contract and the selection of the redeveloper, are subject to the approval of the city council or the county commissioners, and only after all the details of the particular project are formulated is the ultimate decision made by those governing bodies as to whether the proposed redevelopment is to be carried into effect. The planning necessary to accomplish the purposes of the act must necessarily vary from place to place within the same city or county and from city to city and county to county. All that the legislature could do, therefore, was to prescribe general rules and reasonably definite standards, leaving to the local authorities the preparation of the plans and specifications best adapted to accomplish in each instance the desired result, a function which obviously can be performed only by administrative bodies. While the legislature cannot delegate the power to make a law, it may, where necessary, confer authority and discretion in connection with the execution of the law; it may establish primary standards and impose upon others the duty to carry out the declared legislative policy in accordance with the general provisions of the act. So far as Article II, section 1 of the Constitution is concerned the validity of the Urban Redevelopment Law finds support in many authorities: Kelley v. Earle, 325 Pa. 337, 352, 353, 190 A. 140, 147; Williams v. Samuel, 332 Pa. 265, 273, 274, 2 A.2d 834, 838; Chester County Institution District v. Commonwealth, 341 Pa. 49. 61-64, 17 A.2d 212, 218, 219; Dornan v. Philadelphia Housing Authority, 331 Pa. 209, 229, 230, 200 A. 834, 844.

There is no violation of Article IX, sections 1 and 3 of the Constitution which provide that all taxes shall be uniform and that only certain prescribed property may be exempted from taxation. The provision of the Redevelopment Cooperation Law that any city, borough, town, township or county may contract with a Redevelopment Authority with respect to any sums which the Authority may agree to pay for special improvements, services and

facilities to be provided by such city, borough, town, township or county for the benefit of the redevelopment, does not, either expressly or impliedly, have any bearing on, or relation to the subject of tax exemption of property within the redevelopment area. The only tax exemption is that provided by the Urban Redevelopment Law in the case of the bonds issued by an Authority, and it has been held that bonds issued by such a governmental instrumentality are not the kind of property contemplated by the constitutional prohibition against exemption of any property from taxation other than that specified in the Constitution: Kelley v. Earle, 325 Pa. 337, 356, 190 A. 140, 149; Williams v. Samuel, 332 Pa. 265, 274, 275, 2 A.2d 834, 839.

The provisions of Article IX, section 8 and Article XV, section 2 of the Constitution concerning the debts of counties, cities and other municipalities and incorporated districts, and the incurring of liability by any municipal commission, are not violated by the Urban Redevelopment Law. A Redevelopment Authority is not a municipal commission. It is specifically provided by the act that neither the bonds nor any other obligations of an Authority shall be debts or liabilities of any municipality or of the Commonwealth. "In view of that declaration," as was said in Dornan v. Philadelphia Housing Authority, 331 Pa. 209, 231, 200 A. 834, 845, "it is difficult to understand how the act in any way impinges upon these constitutional provisions."

In the provision of the Redevelopment Cooperation Law authorizing loans or donations of money to Redevelopment Authorities there is no violation of Article IX, section 7 of the Constitution forbidding the legislature to authorize any county, city, borough, township or incorporated district to appropriate money for, or to loan its credit to, any corporation, institution or individual. This section of the Constitution has no application to a public corporation such as an Urban Redevelopment Authority, but is restricted to the appropriation of public funds to a purely private enterprise: Downing v. Erie School District, 297 Pa. 474, 480, 147 A. 239, 240; Wentz v. Philadelphia, 301 Pa. 261, 274, 275, 151 A. 883, 888, 889; Tranter v. Allegheny County Authority, 316 Pa. 65, 80, 81, 173 A. 289, 296; Williams v. Samuel, 332 Pa. 265, 275, 2 A.2d 834, 839.

We find, therefore, no merit in any of plaintiff's attacks upon the constitutionality of either the Urban Redevelopment Law or the Redevelopment Cooperation Law. As far as the Act of May 24, 1945, P.L. 977 is concerned, no objections have been advanced to the validity of that statute, and we can see no reason, from a legal or constitutional standpoint, why the Commonwealth cannot validly authorize life insurance companies to invest in city housing projects in redevelopment areas, either through stock ownership or real estate acquisition, subject to the regulations and restrictions provided in the act.

Decree dismissing the bill affirmed; the parties to bear their respective costs.

PATTERSON, JUSTICE (dissenting). The majority opinion holds that it is not an unconstitutional delegation of legislative power to the planning commission, the redevelopment authority, and the governing body to permit them to determine not merely the existence of facts without which the authority could not act but also what constitutes those facts.

What constitutes a blighted area is not specifically defined by the Act. The term "Redevelopment Area" is referred to as, "Any area, whether improved or unimproved, which a planning commission may find to be blighted because of the existence of the conditions enumerated in section two of this act so as to require redevelopment under the provisions of this act." The only criteria by which the existence of a blighted area is to be ascertained are, therefore, found in section 2 of the Act, to wit: unsafe, unsanitary, inadequate or over-crowded condition of the or because of inadequate planning of the area, or excessive land coverage by the buildings thereon, or the lack of proper light and air and open space, or tive design and arrangement of the buildings thereon, or faulty street or lot layout, or economically or socially undesirable land uses." (Italics supplied) The term "Redevelopment" is defined as, "The acquisition, replanning, clearance, rehabilitation or rebuilding of an area for residential recreational, commercial, industrial or other purposes, including the provision of streets, parks, recreational areas and other open spaces."

The delegated power under the act is so broad that each planning commission, authority or governing body has been vested with absolute power to determine what facts shall constitute any of the foregoing elements. The sole restrictions upon exercise of this power exist by virtue of the direction that "The governing body shall not approve a redevelopment proposal unless it is satisfied that adequate provisions will be made to rehouse displaced families, if any, without undue hardship, or, if the municipality in which the project is to be located has filed its objections thereto."

It is the delegation of power to determine the standards in ascertaining the existence of a blighted area which is unconstitutional; not the delegation of power to act when once the jurisdictional facts are found to exist. The constitutional prohibition against delegation of power is not answered by the statement in the majority opinion that "the act contains as definite a descrip-

tion of what constitutes a blighted area as it is reasonably possible to express." There is nothing in the act which delimits the sphere of discretion which may be exercised by the planning commission, governing body, or authority in determining the existence of a blighted area. "Delegation to a fact-finding body of the power to do something, that is in itself circumscribed, after facts are found, is not the delegation of a legislative function. But where the delegation to a fact-finding body empowers it to create the conditions which constitute the fact, this is legislative": Wilson v. Philadelphia School District, 328 Pa. 225, 237, 195 A. 90, 97, 113 A.L.R. 1401. In that case the legislature left to the school board the power to determine what was the necessary amount to be raised and permitted the board to fix the tax rate accordingly. Chief Justice Kephart, speaking for this Court, said (at p. 237 of 328 Pa., at page 97 of 195 A.): "Here the determinative fact, the most material element entering into the tax. may be created without restraint by the Board of Education. This determination can be nothing else than legislative."

Whether power to determine what the law shall be has been delegated must be determined by consideration of the scope of the power given, as well as the manner in which it may be exer-Conceivably, a determination of a blighted area may be reasonable and just under all the circumstances of a given case. It is equally possible and probable that such finding may be arbitrary, capricious and unreasonable. Cf. Schechter Poultry Corporation v. United States, 295 U.S. 495, 532, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947. Pursuant to the powers given, the authority, in conjunction with the planning commission and governing body, may successfully condemn all property within the territorial limits of a city. Such condemnation could not be successfully challenged if the jurisdictional fact is found that the present use of the land is "socially undesirable." Social undesirability has not been defined by the legislature and can be determined solely by the planning commission, authority, and governing body. Having thus condemned the property, the authority may redevelop it for "residential, recreational, commercial, industrial or other purposes." (Italics supplied) Examples of possible exercise of the unrestrained power could be multiplied and applied to "inadequate planning of the area, or excessive land coverage by the buildings thereon . . . defective design and arrangement of the buildings thereon, or faulty street or lot layout, or economically . . . land uses." Delegation of this power to determine what shall constitute the jurisdictional facts is an unlawful delegation of legislative power.

This unlawful delegation of power remains unaffected by the provision requiring approval of the authority's redevelopment

proposal by the "governing body." Section 4(a) of the Act states that the Authority "shall in no way be deemed to be an instrumentality of such city or county, or engaged in the performance of a municipal function." It matters not, therefore, whether a city council or a board of county commissioners approves the redevelopment plans. Not being a municipal function, approval by the respective bodies cannot be said to be the act of a representative of the people. Designation of a local magistrate, or any other person or officer of the Commonwealth, a municipality, county or borough, as the one whose approval is required would be equally ineffective. The power to determine what the law shall be remains in the planning commission and the Authority.

Analysis of the statutes of 23 states, referred to in the majority opinion as being similar to the statutes under consideration, reveals that a majority are slum clearance statutes, similar to the Pennsylvania Housing Authorities Law, Act of 1937, P.L. 955, 35 P.S. § 1541 et seq., the constitutionality of which was sustained in Dornan v. Philadelphia Housing Authority, 331 Pa. 209, 200 A. 834. The constitutionality of statutes dealing with the redevelopment and encompassing similar purposes has not been determined by the appellant courts in any state. The distinction between the two types of statutes is clear when their scope is considered. The decision of this Court in Dornan v. Philadelphia Housing Authority, supra, is inapposite, either by comparison, analogy or otherwise.

I have been unable to find a single case wherein the constitutionality of a redevelopment law, as distinguished from a slum clearance law, was involved. I know of no other statute which has been upheld by this Court wherein power has been delegated to an administrative agency or body politic to determine what shall constitute its own jurisdictional facts. Certainly, this Court has never sustained a delegation of power to determine what shall constitute a jurisdictional fact. To the contrary, such delegation of power has been held unconstitutional: Wilson v. Philadelphia School District, supra.

The conclusion of the majority is contrary to established principles of constitutional law and is a license to the legislature to place in the hands of persons, neither representatives of the people nor responsible to them in any manner, power to determine arbitrarily what shall constitute the law which is to be administered by them.

The decree of the court below should be reversed and the relief prayed for granted.

Chapter 9

REGULATION OF BUSINESS AND PRIVATE CONDUCT

From an administrative standpoint the local government phase of this subject is not considered sufficiently distinctive to warrant special treatment here. Administrative law aspects are accordingly left to those dealing broadly with the subjects of trade regulation and administrative law.

Nor are the substantive problems in the main peculiar to this division of the subject of local government law. There is always the basic inquiry concerning the devolution of power to regulate. Problems of conflict with state law frequently arise. regulations as has historically been true of corporate by-laws under the common law, must meet the test of reasonableness; measures deemed to constitute abuse of authority will be set aside. Local law-making is much more vulnerable to attack on these grounds than are statutes. The same is true of the factor of certainty. Any legislative act may be declared abortive if its meaning cannot be determined for purposes of giving it rational effect. Measures supported by penal sanctions may run afoul due process if they do not give the regulated a reasonably clear guide as to what is lawful and what is not. On the element of certainty see Winters v. People of State of New York, 333 U.S. 507, 68 S. Ct. 665 (1948).

SECTION 1. TRADE REGULATION

CRAWFORD'S CLOTHES, INC., v. BOARD OF COMMIS-SIONERS OF CITY OF NEWARK

Supreme Court of New Jersey, 1944. 131 N.J.L. 97, 35 A.2d 38.

DONGES, JUSTICE. This writ of certiorari brings up an ordinance of the City of Newark and the judgment of conviction of prosecutor for a violation of said ordinance.

The pertinent portion of the ordinance reads: "1. That no person, persons, corporation or corporations may keep open for business or conduct or cause to be conducted for business, any retail store or retail business establishment after 6 P.M. on Tuesday and Thursday of each week, except for that period between Easter and two weeks before Easter and between December 1st and January 1st of each year and except when Tuesday or Thurs-

day shall follow a legal holiday. Restaurants, taverns, drugstores, delicatessen stores, liquor stores, gasoline stations, lending libraries, private schools, movie houses and theatres are exempt from this ordinance."

The ordinance is attacked upon several grounds but we deem it necessary to deal with only one because we are of the opinion that the ordinance is clearly discriminatory. We see no basis in law or in the evidence presented in this case for the distinction made in the exemptions from the operation of the ordinance above enumerated. It is not pointed out why it is proper to prohibit the sale of clothing and permit the sale of stationery supplies, to prohibit the sale of shoes and permit the sale of gasoline, to prohibit the sale of hats and permit the sale of liquor. The distinction sought to be made is arbitrary and clearly discriminatory.

From the evidence presented it would appear that the ordinance is discriminatory in another respect, in that it is testified that some of the stores permitted to remain open on Tuesday and Thursday evenings sell some of the same articles as those required to close. A merchant thus finds himself discriminated against in favor of a competitor.

The case of Spiro v. Union City, 130 N.J.L. 1, 30 A.2d 892, is not in point. The ordinance there regulated the closing hours of drug stores only. Those stores, by reason of the fact that they compound prescriptions and deal in drugs, the incorrect handling of which might have serious effects, are involved with the public safety and subject to special regulation. There was no discrimination between stores in that case. Discrimination is a fatal defect in an ordinance. Siciliano v. Neptune, 83 N.J.L. 158, 83 A. 865.

The conviction is set aside and the ordinance is declared to be invalid, with costs.

See also Hart v. Township of Teaneck, 135 N.J.L. 174, 50 A.2d 856, 169 A.L.R. 973 (1947). Patently the reasonableness of classification made in regulating business hours must be determined with relations to the character of the business as well as the object of the regulation. Thus the hazard that pawnshops may be used in disposing of stolen goods makes it easy for the courts to accept special regulation of pawnshop hours. Solof v. City of Chattanooga, 180 Tenn. 296, 174 S.W.2d 471 (1943).

There has been much litigation over the regulation of barber shop hours. The purpose of regulation might well be to protect the health of the barbers or of the patrons, or both. There undoubtedly have been instances, however, where the object was to protect regular day-time barbers against the competition of chain or other shops operated at night. The Ohio court upheld a barber shop hours ordinance in 1935 but reversed its position eight years later. Wilson v. City of Zanesville, 130 Ohio St. 286, 199 N.E. 187 (1935); City of Cincinnati v. Correll, 141 Ohio St. 535, 49 N.E.2d 412 (1943). Each decision was by a divided court. See J. B. Fordham and J. F. Asher, "Home Rule Powers in Theory and Practice" 9 Ohio St. L.J. 18, 64 (1948).

General Sunday closing measures can be justified on the ground that it conduces to the public welfare to have one day's rest in seven. The rub comes in making exceptions without being discriminatory. See City of Mt. Vernon v. Julian, 369 Ill. 447, 17 N.E.2d 52 (1938).

The fact that the sponsors of a regulatory ordinance have business reasons for their action is hardly controlling if the measure is supportable as a reasonable health or safety regulation. If the economic factor stands alone the regulation is likely to be declared invalid when brought to the test. S. S. Kresge Co. v. Couzens, 290 Mich, 185, 287 N.W. 427 (1939) (ordinance regulating florists declared invalid.) Cf. Dean Milk Co. v. City of Chicago, 385 Ill. 565, 53 N.E.2d 612 (1944) (prohibition of sale of milk in single service paper cartons upheld).

Drastic regulation has been upheld where the danger of imposition upon the public or encouragement of unlawful activities was great. An ordinance requiring pawnbrokers to take the thumb prints of all persons from whom they purchased or received chattels has been upheld. Medias v. City of Indianapolis, 216 Ind. 155, 23 N.E.2d 590 (1939). See Note 125 A.L.R. 598 (1940). A Cleveland ordinance, designed to prevent fraud in the auctioning of jewelry, ordained that jewelry should not be sold at auction for more than sixty days in one year and that a jewelry auctioneer must have been a resident for a year during six months of which he had a regular stock of jewelry. The measure was sustained in Holsman v. Thomas, 112 Ohio St. 397, 147 N.E. 750 (1925).

GOOD HUMOR CORPORATION v. CITY OF NEW YORK

Court of Appeals of New York, 1943. 290 N.Y. 312, 49 N.E.2d 153.

LEHMAN, CHIEF JUDGE. The plaintiff Good Humor Corporation is engaged in the business of manufacturing and selling at retail ice cream and "ice cream products." Its employees make such sales to consumers in the streets of the city from refrigerated motor cars, tricycles and hand carts. Peddling of merchandise in

the streets of the city of New York has long been regulated by statutes and ordinances. With exceptions hereafter noted, the employees of the plaintiff selling its products on the streets of the city of New York obtained licenses in accordance with the provisions of the Administrative Code of the City of New York relating to the regulation and licensing of peddlers. In December 1941 the city of New York adopted or attempted to adopt a Local Law entitled "A local law to amend the administrative code of the city of New York, in relation to the prohibition of itinerant peddling on the streets of the city."

The Local Law provides: "Section 1. The administrative code of the city of New York is hereby amended by adding thereto a new section, to follow section 435-13.0, to read as follows: Section 435-14.0. Itinerant peddling prohibited. a. It shall be unlawful for any person to peddle, hawk, vend or sell any goods, wares or merchandise on any of the streets of the city. b. The provisions of this section shall not apply to: 1. Any person who operates and maintains a pushcart or other vehicle under an open air market license issued by the commissioner of public markets pursuant to the agriculture and markets law; or to-2. Any war veteran or any widow of a war veteran who peddles under a license issued pursuant to section thirty-two of the general business law; or to -3. Any adult blind person who operates under a license issued pursuant to section ten of the general city law or by the commissioner of markets pursuant to section B36-89.0 of the code; or to —4. Any person who sells newspapers and periodicals; or to—5. Any person who owns and operates a farm in the city and who sells produce grown on such farm in the streets of the city; 6. Any person who violates this section, upon conviction thereof, shall be fined not more than ten dollars or imprisoned for not more than ten days, or both. § 2. This local law shall take effect immediately."

Challenging the validity of the Local Law, the Good Humor Corporation has brought an action to enjoin enforcement of the Local Law. Other parties who are prohibited by the statute from continuing to carry on their business of selling merchandise in the streets of the city have been joined as plaintiffs but have filed no separate complaints. In its complaint Good Humor Corporation alleges: "That said Local Law of the City of New York is illegal and void in that (1) the defendant, the city of New York, lacks the power and authority to enact such a law; (2) in that the same is not a proper or valid exercise of the police power of the City of New York and is unreasonable and discriminatory; (3) in that the same is unconstitutional, being in contravention of the Fourteenth Amendment of the Constitution of the United States and article 1, sections 1, 6 and 11 of the Constitution of the State of New York;

and (4) in that the same is arbitrarily oppressive, class legislation and in derogation of the due process and equal protection clauses of both the Constitutions of the United States and the State of New York."

In the City Home Rule Law, Consol. Laws, c. 76, the Legislature has conferred upon the local legislative body of each city, power to adopt and amend local laws in relation to matters therein enumerated including the "acquisition, care, management and use of its streets." § 11. subd. 1. as amended by L.1939, ch. 867. In section 27 of the New York City Charter the Legislature has conferred upon the city council "power to adopt local laws as to it may seem meet, applicable throughout the whole city or only to specified portions thereof, which are not inconsistent with the provisions of this charter, or with the constitution or laws of the United States or of this state, for the good rule and government of the city; for the order, protection and government of persons and property; for the preservation of the public health, comfort, peace and prosperity of the city and its inhabitants; and to effectuate the purposes and provisions of this charter or of the other laws relating to the city." Under these statutes the city has broad power to regulate the use of the city streets and to provide by local law for the good government of the city and the preservation and promotion of the health, safety and general welfare of its inhabitants. Local laws are valid which have a substantial relation to matters within the field where legislative power is vested in the local legislative body of the city by the Constitution and statutes of New York. They must be reasonably calculated to achieve a legitimate public purpose.

The Committee on General Welfare of the Council of the city stated in its report to the Council before the challenged local law was adopted that: "The object of this bill is to prevent unfair competition by itinerant peddlers with storekeepers who pay rent and various taxes, and it is in the interest of the prosperity of the city and its inhabitants. It also has the approval of the Commissioner of Markets. Your committee therefore recommends its adoption." Peddling merchandise upon streets and highways is a lawful vocation recognized and regulated by general statutes adopted from time to time by the Legislature. Though streets and highways are intended primarily for the use of pedestrians and vehicles travelling upon them, the vending of merchandise by persons who have no fixed place of business and who carry their merchandise in vehicles or on their persons and who seek customers from those passing along the streets is a common and traditional use of the streets. The right to use a street by any person even for travelling "must be exercised in a mode consistent with the equal rights of others to use the highway." People v.

Rosenheimer, 209 N.Y. 115, 120, 102 N.E. 530, 532, 46 L.R.A..N.S.. 977, Ann.Cas.1915A, 161. Any use of the streets, and certainly any use of the streets for a private business purpose, which interferes unduly with the use of the streets by others for travel, may doubtless be prohibited, in proper case, by the Legislature. We need not now pause to define the exact limits of the legislative power of a city to adopt local laws "in relation to the care, management and use of its streets." Certainly that power is not broad enough to prohibit use of the street for a lawful business, recognized by statute, for the sole purpose of protecting rent payers and taxpayers against competition from others who do not pay rent or taxes. The object of the Local Law as declared in the report of the Committee on General Welfare is not an object which a city has constitutional power to make effective. People v. Kuc, 272 N.Y. 72, 4 N.E.2d 939, 107 A.L.R. 1272; People v. Cohen, 272 N.Y. 319, 5 N.E.2d 835. That would not necessarily render the Local Law invalid if the local legislative body had other or additional purposes which it had constitutional power to make effective. The statement of the purpose of the Local Law in the committee report is not conclusive. The question here presented is whether the Local Law is reasonably calculated to promote such "other or additional purposes." Stephenson v. Binford, 287 U.S. 251, 276, 53 S.Ct. 181, 189, 77 L.Ed. 288, 87 A.L.R. 721.

We assume that even "the harmless pursuit of a lawful [private | business" on the public streets of New York may be interdicted by the legislative body in order to put an end to "an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated." Valentine v. Chrestensen, 316 U.S. 52, 54, 62 S.Ct. 920, 921, 86 L.Ed. 1262. In their answer the defendants have pleaded that the local law was adopted to remedy harmful conditions which, they allege, are the results of peddling in the streets of New York. At the trial they offered evidence intended to sustain these allegations. The inference might reasonably be drawn from such evidence that some "itinerant peddlers" are unclean in their habits and are irresponsible, insolent, unfair and abusive in the manner in which they conduct their business; that at times some fraudulently use defective scales and measures: that some keep and store their merchandise and offer it for sale in unsanitary manner; and that in some crowded streets and especially at approaches to bridges peddlers and peddlers' carts impede traffic. Doubtless the Legislature might adopt reasonable measures to prevent abuses in connection with licensed peddling: we may assume that the Legislature might even authorize a city by local law to refuse to license any peddlers and to stop all peddling if complete prohibition rather than regulation of peddling is

a reasonable measure to stop abuses. It would nonetheless be a drastic method of ending abuses;—a method that may be used only where the abuses are general and difficult to control by regulation and where they cause or threaten injury to the public so serious that the Legislature might reasonably find it outweighs the harm that would be caused to some by complete prohibition. Adams v. Tanner, 244 U.S. 590, 37 S.Ct. 662, 61 L.Ed. 1336, L.R.A. 1917F, 1163, Ann.Cas.1917D, 973; Tolliver v. Blizzard, 143 Ky. 773, 137 S.W. 509, 34 L.R.A.,N.S., 890. The fundamental question remains whether prohibition rather than regulation in this case is reasonable.

The plaintiff Good Humor Corporation has made a large capital investment in its business. Its employees are examined by a physician before they are hired. They put on fresh white uniforms every day and are taught to be courteous in their dealings with the public. The company employs a chemist to insure the purity of its products. It enjoys a reputation for honesty and it has never cheated customers on weight or content of containers. hicles do not enter congested areas. The city expressly concedes in its brief that these facts are established by the evidence. thus clearly appears that the business of selling merchandise in the streets of the city can be conducted without creating any of the evils which we are told the local law is intended to prevent. Such evils arise only when those who carry on such a business resort to evil practices. All such evils can be avoided by voluntary regulation of the business or by compulsory regulation in accordance with a reasonable statute or ordinance enforced by the police with the cooperation of judicial officers. A business conducted in the manner in which the plaintiff conducts its business promotes the public convenience without causing any injury to the public. An ordinance which prohibits a business so conducted because others conduct a similar business in manner which creates conditions which the public should not be compelled to tolerate, is patently unreasonable, at least where it does not appear that discrimination between the harmful and the harmless is impractical and that the public interest may be served better by complete prohibition than by further attempts at regulation.

We are told that experience has demonstrated to the city authorities that attempts to regulate are futile. It is said that ordinances which have prohibited peddling in specified areas of the city have been declared by the courts unconstitutional. We have, it is true, said that the city cannot by ordinance prohibit peddling in certain sections of the city when conditions in the restricted section "are not dissimilar from those existing in many other areas" and where the ordinance "bears no relation to the welfare of the public, but is designed for the convenience and in-

terest of a special class." People v. Cohen, 272 N.Y. 319, 322, 5 N.E.2d 835; People v. Klinge, 276 N.Y. 292, 12 N.E.2d 161. We have not indicated however, that an ordinance which would prohibit peddling in restricted areas and streets in order to prevent interference with traffic would be invalid where discrimination is based on traffic conditions. See Bus Depot Holding Corp v. Valentine, 288 N.Y. 115, at pages 121, 122, 41 N.E.2d 913. We are told that regulation by licensing peddlers is ineffective because many peddlers sell merchandise illicitly without licenses and that the Magistrates Courts do not put a stop to such unlawful practices by inflicting adequate punishment on wrongdoers. Even Good Humor Corporation, it is said, "has not always been careful to see to it that all its agents selling ice cream on the streets are licensed." So far as appears in this record, the only failure of the Good Humor Corporation to see that all its agents were licensed was occasioned by a dispute whether the place where some agents sold ice cream was in fact a public street. That, however, is unimportant. The important facts conclusively shown on this record are that the business of peddling is lawful when conducted in manner which does not injure or annoy the public or impede traffic upon the street; that peddling can be so conducted and is so conducted by the plaintiff; that the evils which we are told the ordinance prohibiting all peddling in the streets—however conducted—is intended to remedy—are due to indecent, unsanitary or unlawful practices of some peddlers; and finally that these practices can be stopped by statutes, ordinances or sanitary regulations aptly formulated and rigidly en-The argument that the city has not sufficient enforcement officers and that the courts deal too leniently with offenders is not persuasive.

The local law, it seems evident, has no reasonable relation to the public health and is not intended to protect articles of food from contamination through the dust and dirt of the streets for it is not confined to articles of food and even specifically excepts farm products sold by the farmers. It has no reasonable relation to peddling on the streets of New York without a license. That has long been a penal offense and the Local Law does not purport to change the offense, but it would relieve the offenders of competition by licensed peddlers carrying on their work in lawful manner. There is no reason to believe that the offenders would, in such circumstances, voluntarily abandon their illicit practices or that punishment would be more certain or effective. A requirement that every peddler must prominently display his license would permit easy identification of those peddlers who carry on their trade illicitly. Indeed, it is not asserted that even now the police have difficulty in arresting peddlers who are not licensed. The asserted difficulty is that after arrest they receive no adequate punishment. Lax enforcement of regulatory laws affords scant justification for completely prohibitory laws. Contumacious disregard of the law and abuse of legal rights by some will justify curtailment of the legal rights of those who do not abuse them only where there is reasonable ground for a legislative finding that discrimination between the useful and the harmful is impractical. That does not appear in this case.

The judgment should be affirmed with costs.

FINCH, JUDGE (dissenting). When the local legislative body of the city of New York has adopted unanimously a Local Law, which has been approved by the Mayor of the city and the Board of Estimate, regulating itinerant peddlers so that they may only operate pushcarts or other vehicles in open air markets, may the Court of Appeals declare that the legislation is not a reasonable regulation of a purely local problem and that, therefore, the same is unconstitutional?

The effect of the legislation enacted to meet this problem is not to force the vendors of fruits, vegetables and ice cream to abandon their trade. Rather the Local Law simply compels these vendors to change the manner in which they have pursued their calling, by requiring them to confine themselves to the public markets where adequate facilities have been provided. . . .

For years itinerant peddlers have occasioned a pressing municipal problem. There is the problem of the health of the inhabitants of the city, arising from the contamination of food sold from pushcarts, by the dust and dirt of the streets. Then there is the problem of proper supervision, not only as to the safeguarding of food but as to short weighting and other like problems. These problems have been greatly increased by reason of the many itinerant. peddlers who have not only persistently refused to procure licenses but have also evaded sanitary and traffic regulations. These unlicensed peddlers have wholly evaded supervision. In connection with proper supervision, this record shows that during the year 1941 the total number of arrests and summonses for peddling without a license was 24,575. Also, some of these peddlers have been arrested as often as three times a day, and as soon as released on a couple of dollars bail, or arraigned and sentence suspended, are immediately back at the old stand. Other examples showing difficulty of enforcement are cases of one peddler who was arrested eighty-eight times, and of another who was arrested seventy-six times in the year 1941. Even without the express words of the City Home Rule Law, confiding to the municipality the care, management and use of the streets, the problem is a local one. The policy with reference to the use of the streets

as places from which to transact business, is thus clearly for the local legislature of the city to determine. The city of New York might wish to deal with the problem in one way while the city of Buffalo or Syracuse might adopt a different policy.

The policy adopted by the city of New York does not involve destruction of the business of these vendors, but regulation through confinement to open air market places where supervision will be possible and practicable. The availability of cheap means of transportation to any of these open air markets renders them readily accessible to the public. All regulation, of course, involves a certain amount of prohibition. As was said in Kentucky Whip & Collar Co. v. Illinois Cent. R. Co., 299 U.S. 334, 347, 57 S.Ct. 277, 280, 81 L.Ed. 270, "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce . . . " when necessary to protect the people of the states. Granted the existence of the power to regulate, whether the prohibition imposed be narrow or sweeping, temporary or permanent, raises only the question whether the challenged legislation is reasonably adapted to achieving the desired result.

LOUGHRAN, RIPPEY, and DESMOND, JJ., concur with LEHMAN, C. J.

FINCH, J., dissents in opinion in which Lewis and Conway, JJ., concur.

Judgment affirmed.

There are older decisions supporting outright prohibition of peddling. See Commonwealth v. Dunham, 191 Pa. 73, 43 A. 34 (1899). The trend, however, is the other way. See, in addition to the principal case, New Jersey Good Humor, Inc., v. Board of Commissioners of Borough of Bradley Beach, 124 N.J.L. 162, 11 A.2d 113 (1940).

New Jersey has a state law providing for the issuance of state hawkers' and peddlers' licenses to war veterans, which has been construed to override local regulation even where the latter goes no further than excluding peddling from special areas such as a beach and adjacent boardwalk. Higgins v. Krogman, 140 N.J.Eq. 518, 55 A.2d 175 (1947).

Nor has proscription of house-to-house soliciting and peddling generally been sustained by the state courts. Section One of the famous Green River Wyoming ordinance read: "The practice of going in and upon private residences in the Town of Green River, Wyoming, by solicitors, peddlers, hawkers, itinerant merchants and transient vendors of merchandise, not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences, for the purpose of soliciting orders for the sale of goods, wares and merchandise, and/or peddling or hawking the same, is hereby declared to be a nuisance, and punishable as such nuisance as a misdemeanor."

The Fuller Brush Company unsuccessfully attacked this measure in both the federal and state courts. Town of Green River v. Fuller Brush Co., 65 F.2d 112 (C.C.A. 10th, 1933); Town of Green River v. Bungor, 50 Wyo, 52, 58 P.2d 456 (1936); appeal dismissed 300 U.S. 638, 57 S.Ct. 510, rehearing denied 300 U.S. 688, 57 S.Ct. 752 (1937). It has been reported that similar ordinances were adopted in over four hundred municipalities from 1935 to 1939. John R. McIntire and Charles S. Rhyne. "Municipal Legislative Barriers to a Free Market" 8 Law & Contemp. Prob. 359, 374 (1941). The courts of several states have adopted the Wyoming view but those of many more have taken a contrary position. For extensive case and legal periodical references see Charles S. Rhyne, Charles H. Burton and Charles O. Murphy. Municipal Regulation of Peddlers, Solicitors & Itinerant Merchants 34 et seg. (Nat. Inst. of Mun. Law Officers, Report No. 118, 1947). This is a valuable, well-documented monograph on the general subject, including its interstate commerce aspects.

Perhaps the best method of regulating this type of economic activity is a permit and license plan calculated to screen out the dishonest and irresponsible and provide reliable official means of identification of those granted permits and licenses. Messrs. Rhyne, Burton and Murphy note the following distinctions which the courts recognize between peddlers, solicitors and itinerant merchants:

"...a peddler travels from place to place, and sells and delivers at one and the same time; a solicitor or canvasser usually travels around from place to place, or house to house, not carrying his goods with him, but taking orders for future delivery; and a transient or itinerant merchant or vendor occupies a temporary fixed location, selling and delivering from stock on hand, doing business in much the same manner as a permanent business, the principal difference being in the temporary nature or transiency of the business." Op. cit. supra at 79.

They accordingly offer a separate model regulatory ordinance for each class. Id. at 104 et seq.

CHAIET v. CITY OF EAST ORANGE

Supreme Court of New Jersey, 1948. 136 N.J.L. 375, 56 A.2d 599.

Case, Chief Justice. The City of East Orange has ordinances which, read together require those who would engage in the business of selling or exchanging automobiles on open lots to obtain a license to do so, to pay a license fee of \$300 if the area is not more than 10,000 square feet or \$500 if the area exceeds that square footage and within ten days after the license is granted to enclose the area by a fire proof fence not less than 18 inches in height without openings except where the street curb has been lowered in accordance with the rules of the engineer's office. Prosecutors assert that new cars are sold only from showrooms, wherefore the ordinances in actual practice apply only to "used car lots"; a conclusion which may be conceded without weakening the defendant's case.

Three of the prosecutors, severally, come within the application of the ordinance provisions and deny the legality thereof upon the grounds, first, that they are discriminatory and, second, that they are without or are contrary to statutory authority. We shall discuss these grounds in reversed order. Prosecutors do not deny that the power to license businesses generally is lodged with the municipality. Their contention is that the prima facie right of the city is superseded by the imposition of state licenses upon the same business function.

In the year from June 1, 1946, to May 31, 1947, in the City of East Orange, there were twenty-one licensed open lot enterprises of the kind here considered. The number of sales by the several licensees is variable. One dealer testified that he sold about 400 cars during the year. Others refused to say. The bulk of the sales occur during the "season"-April, May, June and part of July. It is obvious that there must be much activity during certain periods and on certain days. The fire hazard, the theft hazard, the protection of pedestrians from promiscuous driving of cars from any point across the sidewalk, the danger to passing traffic of promiscuous entrance and exit of cars, the sanitary hazard where no toilets are maintained, the general confusion of such a business when not supervised and restricted serve to present a fit, almost a necessary, subject for the exercise of a degree of municipal control and an appropriate one for imposing a fee which is commensurate with the occasion for additional municipal expenses.

The general authority of a municipality to license and regulate businesses by ordinance and to impose fees thereon for revenue is contained in R.S. 40:52–1 and 2, N.J.S.A. The statute contains a provision, however, that nothing therein shall be construed to authorize or empower a municipality to license or regulate any person holding a license or certificate issued by any department, board, commission or other agency of the state; and prosecutors contend that the last mentioned provision nullifies the ordinance power of the defendant municipality for the reason that prosecutors hold two sets of state licenses or certificates, one under R.S. 39:10–1 et seq., N.J.S.A., and the other under R.S. 39:3–18, N.J.S.A.

The first of those statutes, R.S. 39:10-1 et seq., N.J.S.A., provides in section 19 that no person shall engage in the business of buying, selling or dealing in motor vehicles in this state unless he is authorized to do so and that the licensing shall be exercised by the Commissioner of Motor Vehicles. Formerly the fee was \$10 and now, by the amendment of ch. 136, P.L.1946, N.J.S.A. 39:10-19, it is \$100; but the fee is paid only on the initial issuing of the license and not on the issuing of the annual The purpose of the statute is stated in section three thereof, R.S. 39:10-3, N.J.S.A., as follows: "This chapter shall be so interpreted and construed as to effectuate its general purpose to regulate and control titles to, and possession of, all motor vehicles in this state, so as to prevent the sale, purchase. disposal, possession, use or operation of stolen motor vehicles, or motor vehicles with fraudulent titles, within this state."

It is clear that the licensing authority of the Commissioner is for a different purpose and within a different field than is that of the municipality under the questioned ordinances. Cf. Mills v. Mosher, 128 N.J.L. 546, 27 A.2d 194; Spiro Drug Service, Inc. v. Union City, 130 N.J.L. 1, affirmed id. 130 N.J.L. 496, 33 A.2d 872. The state license may be said generally to institute a system of supervision by which the business may be compelled to be operated in good faith with the automobile laws of the state and the purchasing public with a relatively nominal and nonrecurring initial issuance charge. The municipal ordinances have to do with local police problems and the cost thereof. Our decision runs on the theory that the state license is a regulatory control over the operation of the business as such and that the municipal license is directed solely toward policing problems and the recovery of commensurate revenues. We discover no discrimination in the bare fact of requiring businesses on open air lots to procure a license, no ulterior purpose, no design to favor local merchants as against outsiders, no scheme to protect one plan against another for the doing of business. N. J. Good Humor, Inc. v. Bradley Beach, 124 N.J.L. 162, 11 A.2d 113; Great A. & P. Tea Co., Inc. v. Camden, 122 N.J.L. 47, 4 A.2d 16. The ordinances are general in character and reasonably cover a definite class. Van Der Vliet

v. Newark, 112 N.J.L. 39, 169 A. 668; Wagman v. Trenton, 102 N.J.L. 492, 134 A. 115; Kolb v. Boonton, 64 N.J.L. 163, 44 A. 873.

The weakness of prosecutors' contention that because a license from the state is required in the operation of their business therefore no municipal license may be required, however divergent in purpose and effect the latter may be, is manifest from the further branch of the argument, which is that also R.S. 39:3-18, N.J.S.A., constitutes such a licensing of motor vehicle dealers by the state as, under R.S. 40:52-1, N.J.S.A., supra, deprives the municipality of its licensing power. There are few businesses which do not involve the use of automobiles and therefore the holding of registration licenses and the use of license plates. R.S. 39:3-18, N.J.S.A., is an enactment which favors motor vehicle dealers in that respect by granting registration privileges not conceded to the ordinary car user and owner. The statute provides that a motor vehicle dealer may procure for a total cost of \$25 general registration and plates in quintuplicate sets, attachable as occasion may require to any motor vehicle operated exclusively for the licensee's business. The contention that this concession to the peculiar nature and requirements of the dealer in motor vehicles is such a license by the state as invokes the prohibition against municipal licensing of open air sale operations is plainly devoid of merit; so much so that it serves to illustrate the purpose of the prohibitory paragraph in R.S. 40:52-1, N.J.S.A., supra, which, as we deduce, is to forbid a parallel licensing operation by both state and municipality.

For the reasons stated, we think that the licensing features of the ordinances are within the authority given in R.S. 40:52–1, N.J.S.A., and are not within the prohibitory clause of that statute.

Prosecutors further argue that the ordinances are illegal because they are arbitrary and discriminatory in that they apply only to the sale of cars from open lots and do not apply to the sale of cars from buildings and in that they require the open air car lots to be enclosed by a fire proof fence not less than 18 inches in height. We have already discussed the substance of the point in part. The purpose of the fence is apparent. It is to mark off the area and to prevent the driving of the cars upon the sidewalk space or across the sidewalk to and from the street except at the fixed exits and entrances, a requirement which we think is in reasonable protection of the convenience and the safety of sidewalk pedestrians and of users of the highway. It may be said that the business of a dealer in motor vehicles when conducted in a building receives some comparable services as by way of fire and police protection. But the tax upon the building carries the pro rata share of the cost of those services where as the mere ground tax is not predicated upon so complete a service. The open air business has the advantages of location and of recourse to expensive municipal undertakings without carrying its full share of the cost burden. We conclude that the point is not well made.

The sales from at least some of the open lots appears to have been heavy. We are unable, from the proofs, to determine that the amount of the fees is confiscatory or unreasonable. The burden of proof thereon is on the prosecutors. American Grocery Company v. Board of Commissioners of the City of New Brunswick, 124 N.J.L. 293, 11 A.2d 599. There is a presumption that a duly adopted ordinance is reasonable. Hoffman v. Mayor Etc. Borough of South River, 180 A. 394, 13 Misc. 618.

The writ of certiorari will be dismissed, with costs.

The principal case does not bear directly upon the post-war problem presented by the exploitation of an automobile-hungry public through the instrumentality of used car lots. Used cars have been sold on a price basis which in law was legitimate but in economic fact had black market characteristics. The customer far down-the dealer's list could not get a new car for some time, but if he was willing to pay dearly he could get what was really a new car second-hand. Might a municipality with broad police powers impose price ceilings on second-hand cars? Perhaps the mobility of the problem would render local regulation ineffectual, in any event.

SECTION 2. PROTECTION OF PUBLIC MORALS

STATE v. THE CRABTREE CO.

Supreme Court of Minnesota, 1944. 218 Minn. 36, 15 N.W.2d 98.

STREISSGUTH, JUSTICE. Defendant is a corporation engaged in the business of selling cigarettes at wholesale in Minneapolis. Having sold 57 cartons to a retail dealer in that city, it was charged with and convicted of the offense of selling cigarettes without a license, contrary to a city ordinance.

The ordinance requires a license of all persons, companies, and corporations who sell cigarettes, without distinction as between retailers, jobbers, wholesalers, and manufacturers. It was enacted, as appears from its title, for the "Good Order of the City, and the Suppression of Vice and Intemperance and the Prevention of Crime." Besides the licensing provisions, there is a sec-

tion making it an offense to "sell, give to, or in any way furnish any cigarettes, cigarette paper or cigarette wrappers in any form to any person under eighteen years of age, or to any minor pupil in any school, college or university."

Defendant offers as a postulate for a broad attack upon the ordinance that "medical science is generally agreed that cigarettes are not deleterious to humans." In order to test the validity of this statement, let us begin with elements. What does "deleterious" mean? It is defined as "Hurtful, morally or physically; injurious, as influence; poisonous; unwholesome." Funk & Wagnalls, New Standard Dictionary, 1932.

Without assuming to ourselves any expert knowledge on the subject, we express grave doubt as to the accuracy of the claims made for their product by tobacco companies, who have spent millions in attempting to dissuade the public from the thought that the use of cigarettes is harmful physically. Adolescent boys and girls, who form an important, if not the principal, group of radio listeners, may be thereby persuaded; and, with their impressionable minds and their ever-present desire to imitate their elders, many of them unquestionably do acquire the cigarette habit in early youth, in perfect, though misplaced, confidence that not the slightest harm, either physical or moral, can result. But our credulity is not sufficiently robust to give even a semblance of reality to such claims. In fact, much of the discussion on the subject in commercial radio programs and in newspaper and magazine advertisements is directed to the claims that the product which is presently being sponsored causes less throat irritation, or fewer coughs, or in general is less harmful than the rival brands. It seems fair to infer from these conflicting claims that even the nondeleterious physical effect of cigarettes generally is at least a debatable question—one upon which our lawmaking bodies, our legislatures and municipal councils, have the final say in determining what the general welfare of the state or municipality requires.

So far as the contest as to the relative merits and demerits of particular brands of cigarettes remains between tobacco companies, it is not serious; it is merely a business, not a social, problem. But if this court should say "amen" to all that has been claimed for cigarettes by their manufacturers and declare any attempted regulation of their sale to be invalid, the social consequences might be tremendous. No court of any state has yet so said, and we do not propose to be the first. On the contrary, every court that has passed upon the question has unqualifiedly affirmed the power of a state, or of a municipality under the general welfare clauses of its charter, to prohibit the sale of cigarettes to minors and students, and to regulate and control, by

license or otherwise, the sale and use of cigarettes generally.¹ And, if consideration be given to the fact that during the past decade marijuana cigarettes and perhaps other drugged cigarettes, not only harmful but actually poisonous, have found their way into illicit traffic, the need for regulation and control becomes self-evident. . . .

No specific legislative sanction is needed to vitalize the general welfare clause of a city charter. No express grant of power to legislate upon any particular subject is necessary. Sverkerson v. City of Minneapolis, 204 Minn. 388, 283 N.W. 555, 120 A.L.R. 944. It is entirely appropriate that each municipality of any considerable size should make its own police regulations for the preservation of the health, safety, and welfare of its own citizens. 37 Am. Jur., Municipal Corporations, §§ 276, 278. And, absent any positive statutory prohibition against its legislating on the sale of cigarettes by wholesalers, a city has ample authority to do so. No such prohibition is found in L.1941, c. 405 § 3, authorizing cities to "license and regulate the sale at retail of cigarettes," for that statute expressly grants further authority to the city to "make such other provisions for the regulation of the sale of cigarettes within its jurisdiction as are permitted by law."

Premising its final argument upon the assumption that the Minneapolis ordinance was intended only as a regulation of the sale of cigarettes to minors, defendant urges that "the end sought is fully attained by regulating the retailer," and that to extract license fees from both retailer and wholesaler is unnecessary and unreasonable. Sight is lost of the fact that some dispensers of cigarettes at retail are difficult to control, and that the licensing of wholesalers may be directed to the distribution of cigarettes to irresponsible retailers, who, with or without the license, bootleg the forbidden weed to minors. Granted that wholesalers and retailers might properly be placed in separate classes for the purpose of licensing (33 Am.Jur., Licenses, § 34, p. 359; Note, 62 A.L.R. 109; Knisely v. Cotterel, 196 Pa. 614, 46 A. 861, 50 L.R.A. 86; Cook v. Marshall County, 196 U.S. 261, 25 S.Ct. 233, 49 L.Ed. 471), there is no compelling reason for distinguishing between sales of cigarettes at retail and sales at wholesale. It is only a question of the precise point in the chain of distribution at which the control shall be exercised. Regulation of the retailer will control the direct distribution to children and others to whom the use of cigarettes is taboo; regulation of the wholesaler, the indirect distribution to them, through pool halls, roadhouses, "honkytonks," and other irresponsible establishments where juveniles are wont to congregate.

¹ The court's footnote is omitted.

We therefore hold the ordinance under attack valid, and applicable to retailer and wholesaler alike.

Affirmed.

An ordinance barring cigarette vending machines has been upheld as a means of controlling sale to minors. Illinois Cigarette Service Co. v. City of Chicago, 89 F.2d 610 (C.C.A.7th, 1937).

The business of operating a pool room may, in the interest of public morals, be forbidden outright. State ex rel. Baylor v. City of Hinton, 109 W.Va. 653, 155 S.E. 912 (1930). It has been determined, however, that the privilege of entering an activity of that character cannot be left to the discretion of an administrative officer without provision for opportunity for a hearing. Assaid v. City of Roanoke, 179 Va. 47, 18 S.E.2d 287 (1942).

Is there a sufficient police power nexus between the playing of mechanical or any other kind of musical instrument on premises where beer or intoxicating liquor is sold and public morals to support an ordinance proscribing such playing? The answer in Zinn v. City of Steelville, 351 Mo. 413, 173 S.W.2d 398 (1943), was in the affirmative.

SCHUMAN v. PICKERT

Supreme Court of Michigan, 1936. 277 Mich. 225, 269 N.W. 152.

Bushnell, Justice. On August 30, 1935, appellant secured a permit from the commissioner of police of the city of Detroit to exhibit a talking motion picture entitled "The Youth of Maxim." Prior to the public showing of the picture, this permit was revoked.

Both sides produced leading citizens who testified in the circuit court upon the hearing for a writ of mandamus. One of these indicated that the film depicted the revolution in Russia in 1907. He said: "It is not communistic except that it refers to Lenin. It is as communistic as the picture of the Boston Tea Party." None of the witnesses could point to any direct portrayal of sexual immorality, though some view it as subversive of the accepted principles of our form of government and inflammatory in nature. Opinions, however, differed on this, as well as its probable effect upon the "young and immature."

The trial judge, after a personal view of the proposed picture, declined to grant the writ of mandamus, basing his decisions upon an absence of proof of flagrant abuse of discretion on the part of respondent.

Section 20, Chapter 70, of the Compiled Ordinances of the City of Detroit for 1926, reads: "Every person or company operating under this ordinance and in whose place of amusement or exhibition shall be displayed moving pictures of any character, kind or description shall present the pictures, films or plates so sought to be displayed to the Commissioner or Superintendent of Police for his inspection. Said Commissioner or Superintendent of Police is hereby authorized, and it is hereby made his duty to inspect or cause to be inspected said pictures, plates or films, and if in his judgment they are indecent or immoral, he shall reject the same and notify the person or company operating the place of amusement or exhibition from whom said plates or films were received, that the same cannot be used; and the person or company using them after they have been rejected by the Commissioner or Superintendent of Police shall be punished as hereinafter provided. Approved September 24, 1907)."

The commissioner was not called as a witness but his reasoning on the claimed immorality of the picture is stated in the amended answer. He says: "The said motion picture, "The Youth of Maxim,' is immoral for the reason that the same is pure Soviet propaganda and is likely to instill class hatred and hatred of the existing government and social order of the United States and that because of the foregoing the said motion picture is contrary to the terms and provisions of section 20, Chapter 70, of the Compiled Ordinances of the City of Detroit, 1926, hereinbefore set forth."

The original answer gave a different reason:

". . . that protests were lodged with this respondent by representatives of various religious organizations, veterans organizations and civic organizations protesting against the showing of the said film and averring that the showing of the said film would be likely to incite class hatred and riots.

"And this respondent further avers that under the provisions of section 5, subdivision (c) of Chapter XXI of the Charter of the City of Detroit, this respondent is charged with the duty of preserving the public peace and preventing of crime, arrest of offenders and to protect the rights of persons and property, guard the public health, preserve order and enforce the laws of the State and the ordinances of the city, which in the exercise of his discretion would preserve the public peace and prevent crime, protect the rights of persons and property, and preserve order, and that by virtue of such authority this respondent did revoke the permit for the showing of said motion picture."

Respondent acting in the capacity of a moving picture censor under the ordinance cannot call into action his general powers to "preserve the public peace and prevent crime, arrest offenders," etc., without at the same time exercising his duty to "protect the

rights of persons and property, guard the public health, preserve order and enforce the laws of the State and the ordinances of the city." Section 5, subsection (c), chapter XXI of the Charter of the City of Detroit. Nor is he specifically charged with the self-suggested duty of preserving the international relations between the United States of America and the Union of Soviet Socialist Republics. The record silences the latter suggestion, but emphasizes the first—the enforcement of "the ordinances of the city" including this one, wherein his authority is specifically limited to matters of decency and morality.

Deep love for our own form of government is inclined to accentuate our aversion for that of others, but it should not warp our judgment or dull our vision. The petitioner has a constitutional property right to show a film which is not indecent or immoral.

The decency of the film is hardly disputed, but its morality is questioned. Appellee properly suggests that immorality is not necessarily confined to matters sexual in their nature; it may be that which is contra bonos mores (Bouvier's Law Dictionary); or "not moral, inconsistent with rectitude, purity or good morals; contrary to conscience or moral law; wicked; vicious; licentious, as, an immoral man or deed." Webster's New International Dictionary (2d Ed.). Its synonyms are: Corrupt, indecent, depraved, dissolute; and its antonyms are: Decent, upright, good, right. That may be immoral which is not decent.

Appellee argues that a motion picture film may be suppressed on the broad grounds that it is hostile to the welfare of the general public, citing Exchange National Bank v. Henderson, 139 Ga. 260, 77 S.E. 36, 51 L.R.A.,N.S., 549. "Immoral" is also defined as: "Contrary to good order or public welfare; inimical to the rights or common interests of others; a legal and commercial sense." Cent.Dict., and quotations therein.

No adjudicated cases are found in this jurisdiction construing ordinances authorizing the censorship of motion pictures, but the matter has been considered elsewhere. See Fox Film Corp. v. City of Chicago (D.C.) 247 F. 231; City of Chicago v. Fox Film Corp. (C.C.A.) 251 F. 883; Anderson v. City of Hattiesburg, 131 Miss. 216, 94 So. 163; Bainbridge v. City of Minneapolis, 131 Minn. 195, 154 N.W. 964, L.R.A.1916C, 224, and annotations on page 227, and Seattle v. Smythe, 97 Wash. 351, 166 P. 1150, L.R.A.1918A, 231; Epoch Producing Co. v. Davis, 19 Ohio N.P. (N.S.) 465; Message Photo-Play Co. v. Bell, 179 App.Div. 13, 166 N.Y.S. 338; Application of Fox Film Corp., 295 Pa. 461, 145 A. 514, 64 A.L.R. 499; United Artists Corp. v. Thompson, 339 Ill. 595, 171 N.E. 742. See also, cases annotated in 64 A.L.R. 505.

In our opinion decision should rest upon lack of power in respondent, and not on the question of abuse of his discretion. The legislative body of the city has granted him power of suppression and has limited it to "indecent or immoral" pictures. The construction of the ordinance and the scope of respondent's powers are questions of law. Respondent has, and can have, no discretion to extend his own powers under guise of interpretation. Nor can the opinion of witnesses do it for him. If further power of suppression is desirable, the council may provide it by amendment in apt words.

The adoption of respondent's contentions, as to his discretion in construing and applying the ordinance, would invest him with dangerous and plainly unconstitutional power. It would enable him to hold as "immoral" and suppress any picture involving social problems, politics, religion, or any human activity according to his own view, and there would be no redress if his acts should be supported by the opinion of witnesses. Zealots could, and would, furnish the required proof. The most conscientious and high-minded persons, as well as intense partisans, find no difficulty in supporting their contentions as moral issues, as the witnesses in this case have done.

Here, they say that the picture is immoral because it has a tendency to support communism or sovietism. The ordinary and popular sense of the word "immoral" does not include the interpretation given it by the respondent.

No feeling against foreign political policies or forms of government should be permitted to establish the principle that a police officer may be invested with discretion to determine his own powers of suppression or charge the plain terms of his authority. The constitutional method is for the legislative body of the city to clearly define and delimit the power of its officers. By such method the scope of the ordinance may be determined, the validity of the authority tested, and constitutional rights preserved.

The trial judge was in error and a writ of mandamus should issue. The order below is vacated, and the trial judge is directed to issue the writ. Respondent having acted in good faith in a public matter, no costs will be allowed.

NORTH, C. J., and FEAD, BUTZEL, and SHARPE, JJ., concurred with BUSHNELL, J.

WIEST, JUSTICE (concurring in result). The ordinance, perhaps unfortunately, does not explicitly fit the case, and, saying no more, I concur in the result. Toy, J., concurred with WIEST, J.

POTTER, J., took no part in the decision.

See Comments 49 Yale L.J. 87, 97 (1939) and 39 Col.L.Rev. 1383 (1939). The leading film censorship case is Mutual Film Corporation v. Industrial Commission of Ohio, 236 U.S. 230, 35 S.Ct. 387 (1915). An Ohio statute, which provided that "only such films as are in the judgment of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board," was upheld against attack grounded on the commerce clause, the state guaranty of freedom of speech and the press and the doctrine of non-delegability of legislative power. That was before the broad significance of movies as a means of public expression had emerged and before freedom of speech and the press were brought within the protection of Fourteenth Amendment due process. Assuming that there is no valid constitutional objection to censorship aimed solely at obscenity is it supportable as applied to political and social ideas? Does it make a difference that the showing of the film is on a commercial basis? See Thayer Amusement Corporation v. Moulton, 63 R.I. 182, 7 A.2d 682 (1939); I Zechariah Chafee, Jr., Government and Mass Communications 235-241 (1947).

Chapter 10

CONTRACTS

SECTION 1. GENERAL CONSIDERATIONS

It is apparent that local government could not operate without the ancillary power to enter into contractual relations. The power is accordingly usually conferred in general terms and thereby made broadly available in aid of the primary powers of the local unit. It is readily implied, moreover, where necessary to the effectuation of a primary power. There is, then, no occasion for undertaking to set out with particularity the matters with respect to which local government may contract. This does not mean that one need not consult the positive law in connection with a particular problem. On the contrary, the question of power should be examined in every case with careful reference to the language of pertinent constitutional, statutory and charter provisions, including those constituting special limitations upon the power.

In this chapter our principal concern, after noting significant limitations on the power to contract, will be with the manner of exercising the power and with the methods of establishing local government responsibility, whether on the contract as such (by force of original validity or effective ratification), on the theory of estoppel or on a theory derived from the law of restitution. Consideration of the manner of exercising the power properly embraces representation by officers or agents in making and executing contracts, formal requisites and contract procedure. The cases cannot be pigeon-holed; questions as to official authority, ratification, estoppel and restitution may all be presented in one litigation. Cases of that sort provide good practical grist. Thus, sectional arrangement in this chapter is employed merely as a loose framework for the development of the subject.

There is a deeply-rooted fiduciary principle that one may not serve two masters by making contracts as an individual with himself as a fiduciary. This applies to officers of local government. II Dillon, Mun. Corps. § 772 (5th ed. 1911). There is some authority that this principle would not avoid a contract where the officer individually concerned did not cast the deciding vote. City of Ensley v. Hollingsworth & Co., 170 Ala. 396, 54 So. 95 (1910). For the contrary view see Bay v. Davidson, 133 Iowa 688, 111 N.W. 25 (1907); Pickett v. School District No.

1, Town of Wiota, 25 Wis. 551 (1870); II Dillon, op. cit. supra § 773. In the Pickett case it was declared, obiter, that the contract was simply rendered voidable and that there could be recovery in quasi-contract for benefits received and retained. Where the subject is governed by statute, as is now commonly the case, there is likely to be an express provision rendering offending contracts void. That the interested member of a local governing body did not vote on the matter does not avail in the teeth of a prohibitory statute. City of Bristol v. Dominion Nat. Bank, 153 Va. 71, 149 S.E. 632 (1929). For applications of statutes making contracts of this character voidable, see Clover Hill Hospital, Inc., v. City of Lawrence, 315 Mass. 284, 52 N.E.2d 400 (1943); Grady v. City of Livingston, 115 Mont. 47, 141 P.2d 346 (1943).

MILLER v. CITY OF MARTINEZ

District Court of Appeal, First District, Division 1, California, 1938. 28 Cal.App.2d 364, 82 P.2d 519.

TUTTLE, JUSTICE PRO TEM. By this action plaintiff as a taxpayer and resident of the City of Martinez seeks to recover the sum of \$4,639.89, under the provisions of a statute which forbids a public officer from being interested in contracts made by a governing body of which he is a member. The trial court sustained demurrers to the third amended complaint in this action, and upon a failure to amend, judgment was entered for defendants.

The following facts appear in the complaint: Plaintiff is a citizen, resident and a taxpayer of the City of Martinez. Martinez is a municipal corporation of the sixth class governed by a city council consisting of five members, and at the time of the transactions in question in this action the defendants Severns, Winkelman, Connolly, Claeys and Brady constituted the city council. Shell Oil Company maintained and operated in the City of Martinez a plant and office at which it carried on the business of refining and manufacturing petroleum products and other merchandise which were intended for sale and were to be sold in Martinez; City Councilman Severns was Shell Oil Company's manager in charge of this office; the defendants who constituted the Martinez city council knew that products which the company refined and manufactured at Martinez were intended for sale and were to be sold in Martinez. The company was also engaged in the City of Martinez in the business of selling in Martinez the petroleum products and other merchandise which it refined and manufactured at the Martinez plant for sale in Martinez. During all the times here involved defendant Severns was not only a member of the city council and a paid employee of Shell Oil Company in charge as office manager of the company's

said Martinez office, but he was also the owner of a large number of shares of said Shell Oil Company's stock. These facts were known to all of the defendants. During the time that defendant Severns was in the employ of Shell Oil Company as manager of its said Martinez office, the owner of a large block of Shell Oil Company's stock and at the same time a member of the Martinez city council, the company sold to the city council at Martinez and the City of Martinez through its city council purchased from Shell Oil Company petroleum products and other merchandise which the company had refined and manufactured at its Martinez plant for sale by the company in Martinez. The company presented to the city council claims for the products which it had sold to the city and which the city had purchased through the city council. The city council and every member thereof, including defendant Severns, voted in favor of the approval of these claims and ordered warrants drawn on the city treasury for their payment. Warrants were accordingly drawn on the city treasury in favor of Shell Oil Company, were delivered to it and were paid out of funds in the city treasury. Plaintiff as a taxpayer demanded of the city council that it authorize and institute in the name of the city an action against the Shell Oil Company and against the individuals who constituted the city council to recover from them and to require them to pay into the city treasury for the benefit of the taxpayers of the city all money paid out of the city treasury on claims presented by Shell Oil Company for sales made by the company to the city while the defendant Severns was at the same time a member of the city council and in the employ of Shell Oil Company as manager of its said Martinez office. The city council by resolution rejected the demand and refused to authorize or institute such action. This action by plaintiff as a citizen, resident and taxpayer of Martinez followed.

The grounds of demurrer were both general and special. Taking up the general demurrers, it is contended by respondents that the complaint fails to show that defendant and City Councilman Severns was "interested" in the sale to the city by the Shell Oil Company, within the purview of section 886 of the Municipal Corporation Act (Deering's Gen.Laws, Act 5233, § 886), which reads as follows: "No officer of such city . . . shall be interested, directly or indirectly, in any contract with such city . . . or in doing any work or furnishing any supplies for the use of such city . . .; and any claim for compensation for work done, or supplies or materials furnished, in which any such officer is interested, shall be void . . ."

The case of Mumma v. Town of Brewster, 174 Wash. 112, 24 P. 2d 438, is relied upon by respondents. It is there held that the disqualifying interest of the public official must be a financial one.

While this may be the rule in the state of Washington, we are satisfied that in our own jurisdiction it is otherwise. In the case of Hobbs, Wall & Co. v. Moran, 109 Cal.App. 316, 293 P. 145, the manager of the company was also a councilman of Crescent City. Holding void a transaction between the company and the city the court said (page 147): "It is argued that since the councilman, Dressler, was merely employed and worked for a salary as manager of the mercantile corporation, that he was not a stockholder and that he had no pecuniary interest therein, he was therefore not interested in the business to such an extent or in such a manner as to invalidate the transaction, since the supplies were purchased for the city in perfect good faith. The statute declares that a transaction consisting of the 'furnishing of any supplies' of a city or town, in which an officer is 'directly or indirectly' interested, shall be void. As manager of the mercantile business, which employment demanded strict loyalty to his employer, it may be inferred Dressler, as a councilman, was not free to negotiate a bargain in behalf of the city as favorable to the municipality as though these conflicting interests did not exist. Dressler's membership on the council may reasonably be expected to influence his associates in purchasing supplies for the city. The desire to favor a fellow councilman, unwarranted confidence, or carelessness in bargaining for supplies might result in a substantial loss to the city. It is not necessary to show actual fraud, dishonesty, or loss to invalidate the transaction. purpose of the statute is to remove all indirect influence of an interested officer as well as to discourage deliberate dishonesty. Nothing in the relationship of a public officer should prevent him from exercising absolute loyalty and undivided allegiance to the best interest of the municipality he serves. Although Mr. Dressler had no greater interest in the transaction than is shown by the mere agency as business manager of the store from which the supplies were purchased, even though they were obtained in perfect good faith at favorable prices, still the transaction was void and the claims were illegally allowed."

It would thus appear that the "interest" need not involve any direct financial gain upon the part of the public official. It may be any interest which would prevent him from exercising absolute loyalty and undivided allegiance to the best interest of the municipality he serves. He should be absolutely free from any influence other than that which may grow out of the obligations he owes the public.

Here, accepting the allegations of the complaint, the city councilman is office manager of the Shell Oil Company in Martinez. The city purchases petroleum products from his company. Is he a free agent in respect to this transaction? If he voted against

the purchase would he not believe that such a course would be prejudicial to his standing with the corporation? Obviously, applying the ordinary rules of human conduct and behavior, he would consider that it would be to his interest to approve the transaction, and this is not impugning the good faith and honesty of Severns. As was stated in the Hobbs, Wall & Co. Case, supra, "The purpose of the statute is to remove all *indirect influence* of an interested officer as well as to discourage deliberate dishonesty". (Italics ours.)

Concluding this phase of the case, we are satisfied that the complaint shows that defendant Severns was interested in the transaction within the language of the statute.

It is contended that the purchase price of the goods cannot be recovered without an offer to return them. The contention is devoid of merit. It is directly answered in the following language taken from the case of County of Shasta v. Moody, 90 Cal.App. 519, 523, 524, 265 P. 1032, 1034: "Appellant strenuously contends that the county is estopped from maintaining this action without first restoring, or offering to restore, to him the benefits received from the job work, printing, advertising, etc. There is no merit in this contention. The contracts being void under the express provisions of the statute, and also being against public policy, there is no ground for any equitable considerations, presumptions or estoppels. Berka v. Woodward, supra (125 Cal. 119, 128, 57 P. 777, 45 L.R.A. 420, 73 Am.St.Rep. 31); Stockton Plumbing & Supply Co. v. Wheeler, supra (68 Cal.App. 592, 229 P. 1020); Neilson v. Richards, supra (75 Cal.App. 680, 243 P. 697) 21 Cal. Jur. 888.

We are of the opinion that the complaint states a cause of action. It is therefore ordered that the judgment be reversed and the trial court directed to overrule the demurrer.

Relationship between an officer and someone with an adverse interest has seldom been found to give the officer a disqualifying interest. Thompson v. District Board of School District No. 1 of Township of Moorland, 252 Mich. 629, 233 N.W. 439 (1930); Note 74 A.L.R. 792 (1931). A contrary result was reached in Haislip v. White, 124 W.Va. 633, 22 S.E.2d 361 (1942). A school board member voted for the employment of his wife by the board. He was removed from office under a statute which provided for ouster of one who became, directly or indirectly, pecuniarily interested in the proceeds of any contract or service for or in the awarding or letting of which he might have any voice, influence or control.

DONOVAN v. KANSAS CITY

Supreme Court of Missouri, 1943. 352 Mo. 430, 175 S.W.2d 874 (1943), 179 S.W.2d 108 (1944). Appeal dismissed 322 U.S. 707, 64 S.Ct. 1049 (1944).

BOHLING, COMMISSIONER. Cast on demurrer nisi, plaintiff suffered judgment and appealed. Plaintiff seeks to recover for perishable foods delivered upon telephonic instructions to hospitals and penal institutions of Kansas City. The petition is in two counts in the alternative. The aggregate amount is laid at \$97,-562.47. Count one sounds in tort as for trover and conversion on the theory the title to the foods did not pass and seeks damages of the reasonable value of the foods. Count two is in equity and seeks the value of the benefits accruing to defendant. Plaintiff's core idea is that a contract is not involved. From the allegations in plaintiff's petition infra, the principal issues are whether defendant municipality is liable for perishable foods furnished for its immediate, necessary, and beneficial use in the maintenance of its sundry hospitals, reformatories, and kindred institutions and consumed by the inmates and attendants of such institutions (1) in the absence of a written contract therefor subscribed by the parties to the transaction (in accord with statutory—§ 3349, infra—and charter—§§ 92 and 94, infra—requirements); or (in accord with charter and ordinance provisions) (2) in the absence of a written statement from the municipality's Director of Finance that a balance otherwise unencumbered existed to the credit of the appropriation against which such supplies were to be charged and a cash balance otherwise unencumbered existed in the treasury to the credit of the appropriation from which payment was to be made—§§ 91, 92, 93, and 94, infra—or (3) in the absence of an award of the order for such perishable foods to the lowest and best bidder after due opportunity for competition—§§ 80 and 92, infra.

Able counsel have advanced, we think, every conceivable issue for consideration and many authorities are presented. We understand other matters are pending the outcome of this litigation. Due to the presentation and the importance of the case we may give it more space than it ordinarily would receive under the Missouri law involved. Learned authors recognize that confusion exists in the cases. We shall endeavor to restrict observations to the particular facts of this case, the prohibitory enactments and the public policy of Missouri—factors which defendant says distinguish Missouri cases from others and when recognized tend to eliminate some of the confusion. An innocent third party is not involved. We set out so much of the

statutory and charter (and ordinance, if found necessary) provisions as are material to the disposition of the case.

Section 3349, R.S.1939, Mo.R.S.A. § 3349, reads: "No . . . city . . . shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract . . . , including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing." See, also, Mo.Const. Art. IV, § 48, Mo.R.S.A.

The following are from Article IV of the Charter of Kansas City:

"Sec. 80. Division of Purchases and Supplies. There shall be in the department of finance a division of purchases and supplies. The Commissioner of Purchases and Supplies shall make all purchases and contracts for purchase for the city in the manner provided by ordinance; provided, however, that in all cases there shall be opportunity for competition. . . ."

"Sec. 91. Liability for Authorization in Excess of Appropriation. The Commissioner of Purchase and Supplies shall not furnish nor order any supplies, materials, services other than personal, or equipment for a department unless he shall obtain from the Director of Finance a written statement that there is a balance otherwise unencumbered to the credit of the appropriation to which the same is to be charged and a cash balance otherwise unencumbered in the treasury to the credit of the fund from which payment is to be made, each sufficient to meet the obligation thereby incurred.

"If the Commissioner of Purchases and Supplies shall authorize or incur any obligation against the city without first securing such certification, he shall be liable personally and on his bond for the amount of such obligation.

"If the Director of Finance shall make a false certification as to the sufficiency of any such appropriation or unencumbered cash balance, he shall be liable personally and on his bond to the extent that the amount so certified exceeds such balance."

"Sec. 92. Contracts. All contracts shall be executed in the name of the city by the head of the department or officer concerned, except contracts for the purchase of supplies, material, services other than personal, or equipment made by the Commissioner of Purchases and Supplies. No contract or order imposing any financial obligation on the city shall be binding upon the city unless it be in writing and unless there is a balance otherwise unencumbered to the credit of the appropriation to which the same is to be charged, and a cash balance otherwise unencumbered in

the treasury to the credit of the fund from which payment is to be made, each sufficient to meet the obligation thereby incurred, and unless such contract or order bear the certificate of the Director of Finance so stating . . . All contracts and purchases shall be awarded to the lowest and best bidder after due opportunity for competition in accordance with this charter and the ordinances of the city; but, unless otherwise provided by ordinance, it shall not be necessary to advertise for bids in any newspaper in case of contracts and purchases involving an expenditure less than \$2,500."

Section 93 relates to the payment of claims and to duties of the Director of Finance in the issuance of warrants on the Treasurer. So far as material here it contains in general terms provisions imposing certain duties and personal liability on the Director of Finance and liability on his bond for enumerated derelictions of duty. Consult Sec. 91, supra.

"Sec. 94. Obligations—When Void. All contracts, agreements or other obligations entered into, all ordinances and resolutions passed, and all orders made contrary to the provisions of this article shall be void, and no person whatever shall have any claim or demand against the city thereunder, nor shall the Council or any officer of the city waive or qualify the limitations fixed by this article, or impose upon the city any liability whatever in excess thereof."

Ordinance provisions, if they become of importance, will be developed in the course of the opinion.

Plaintiff's petition is to be read in the light of the above enactments. Its allegations are to the following effect: . . .

From November 23, 1937, to April 1, 1938, and from October 1, 1938, to April 29, 1939, from day to day, plaintiff's decedent, upon telephonic instructions from defendant, acting through its Commissioner of Purchases and Supplies (hereinafter sometimes referred to as Commissioner) delivered to defendant large quantities of perishable foods for the purposes aforesaid (and which were so used) of the aggregate value of \$97,562.47. Plaintiff's decedent delivered said food products believing, in good faith, that defendant would pay therefor, without which belief such deliveries would not have been made; but defendant refused plaintiff's decedent and plaintiff payment therefor, and still so refuses, upon the following grounds asserted by it: Here plaintiff's petition sets forth the municipality's defenses in greater detail than we have stated them in the first paragraph of this opinion.

The normal practice was to use five duplicate printed forms for the requisition and purchase of perishable foods. Upon the origimal would be listed the items required and the prices therefor. It showed the approval of the department head, bore the certification of the Director of Finance and was signed by the Commissioner of Purchases and Supplies. This would be sent to plaintiff's decedent, who would return the same with his invoices in triplicate to the Commissioner, which invoices would then be paid. Duplicates would go to various designated officials and one duplicate to plaintiff's decedent.

After the respective appropriations became exhausted, the The head of the department would requisition practice was: the foods upon defendant's printed form, subscribe the same and forward it to the Commissioner of Purchases and Supplies; then said Commissioner would order by telephone such foods from plaintiff's decedent and direct the date of delivery, in many instances causing said original to be stamped "Confirmation." Said original would carry no prices and no signature except the signature of the department head. The Commissioner retained the original and all copies of the printed form. Plaintiff's decedent, in turn, would deliver the requisitioned foods and take a receipt therefor, signed by the department head, upon his invoices and deposit with the Commissioner the original and two carbons of said invoices, which would be attached to defendant's requisition. Such were the only writings involved. Said writings did not include the written statements required of the Director of Finance. The Commissioner of Purchases and Supplies so ordered without first securing said written statements. Defendant had duly appropriated money to operate and maintain said hospitals and penal institutions, but, prior to the expiration of the respective fiscal years, said appropriations had become exhausted and at the several times of such purchases, there were no balances, otherwise unencumbered, to the credit of said appropriations and no cash balances, otherwise unencumbered, in the treasury to the credit of the fund from which payment was to be made.

The petition alleged that an opportunity for competition to sell said foods existed but disavowed knowledge that said purchases were had after competition. None of the purchases amounted to \$2,500 or more and none was under a term supply contract.

Each count also contained allegations to the effect that if the order for the purchases be void, as claimed by the municipality, then title to the foods delivered never passed and defendant municipality wrongfully converted said foods to its use through consumption by the inmates and attendants of its institutions.

Writing. In the course of its brief plaintiff states that § 3349, supra, was complied with and that said section is analogous to the statute of frauds, further stating that all orders were on decedent's invoices bearing, in print, "Baby Beef Market, S. J. Donovan, Mfg." The contention is ruled adversely to plaintiff in

Fleshner v. Kansas City, 348 Mo. 978, 982[2], 156 S.W.2d 706, 707[7], pointing out that an unenforceable contract, one within the statute of frauds, is not a void contract, one prohibited from being made. Performance on one side may make the former but does not make the latter enforceable. The transactions before us are not evidenced by writings within the purview of § 3349; for instance, subscribed by the parties thereto or their lawfully authorized agents.

In addition: The orders carried no written certification by the Director of Finance that a due credit existed in the appropriation or that a due cash balance was in the treasury sufficient for payment as required by charter provisions. See §§ 91 and 92, supra. Whether said orders were awarded after due opportunity for competition is not alleged.

Illegal or ultra vires. Asserting the terms "illegal" and "unlawful" are synonymous (Dameron v. Hamilton, 264 Mo. 103, 123, 174 S.W. 425, 430; United States v. Mulvey, 2 Cir., 232 F. 513, 519), the municipality argues the issues from the premise that the transactions involved were illegal, it being expressly prohibited from contracting orally. This might quickly dispose of the case. Plaintiff contends the purchases were not illegal in the true sense of the word.

The municipality cites decisions using the terms "illegal" and "unlawful" in characterizing like Missouri municipal contracts. Cheeney v. Brookfield, 60 Mo. 53, 54; Fleshner v. Kansas City, 348 Mo. 978, 981[1], 156 S.W.2d 706, 707[3], among others. Generally courts leave parties to an illegal agreement where they put themselves; refusing aid to either. Exceptions to this rule are immaterial here. The cases stressed adjudicate contracts wherein the consideration or the promise or the purpose of the contract was illegal; such as: Sedalia Board of Trade v. Brady, 78 Mo.App. 585, 591; Rainer v. Western Union Tel. Co., Mo.App., 91 S.W.2d 202, 207[2]; Finley v. Williamson, 202 Mo. App. 276, 289, 215 S.W. 743, 746[4, 5]; among others. Consult 17 C.J.S. Contracts, p. 656, § 272, p. 668, § 279, p. 669, § 280. "Illegal" and "unlawful," as applied to acts of municipalities in decisions, more frequently refer to a lack of corporate authority; that is, acts ultra vires and void in the sense they are ineffectual to create legal rights and obligations. See Mo.Const. Art. IV, § 48. City of St. Louis v. Davidson, 102 Mo. 149, 153, 14 S.W. 825, 826, 22 Am.St.Rep. 764, was an action by the city to recover for work actually performed by prisoners under a contract and not paid for by defendant. The court considered the plea of the city's legal disability to contract personal to the city and not available to defendant, and treated the contract as ultra vires the municipality in affirming the judgment for the city. . . . The petition does not disclose an illegal consideration or an illegal purpose within the purview of the cases stressed by the municipality. The municipality's challenge reaches the failure to follow statutory and charter enactments for the creation of a binding obligation of the municipality. It is in this restricted sense, i.e., in the sense of an ultra vires act, that the terms "illegal" and "unlawful" are here understood.

Estoppel. We are of opinion equitable estoppel may not be successfully invoked against the defenses asserted by the municipality under the pleaded facts. . . .

We hold, in conformity with Missouri decisions, that the statutory requirement with respect to contracts with municipalities being in writing is mandatory, not merely directory, and, absent a written contract, transactions such as revealed by this record are ultra vires the municipality in the primary sense of that term. By statutory prohibition, § 3349, supra, municipal contracts are not within the scope of the municipality's powers, contracts not expressly authorized by law, and contracts, including the consideration, not in writing, dated when made and subscribed by the parties or their authorized agents are placed on the same legal footing. Under the statute it is as much ultra vires for a Missouri municipality to incur a liability in the nature of a contractural obligation in the absence of a writing as to incur a liability not within the scope of its corporate powers or one not expressly authorized by law. See Savage v. Springfield, 83 Mo.App. 323, 329; Cook & Son v. Cameron, 144 Mo.App. 137, 143, 128 S.W. 269, 270; Perkins v. Independent School District, 99 Mo. App. 483, 488, 74 S.W. 122, 124; Montague Compressed Air Co. v. Fulton, 166 Mo.App. 11, 29, 30, 148 S.W. 422, 428[11]; Likes v. Rolla, 184 Mo.App. 296, 302, 167 S.W. 645, 649; State ex rel. v. Dierkes, 214 Mo. 578, 589(II), 113 S.W. 1077, 1080(2); Cotter v. Kansas City, 251 Mo. 224, 229, 158 S.W. 52, 53[1]; Eureka Fire Hose Mfg. Co. v. Portageville, Mo.App., 106 S.W.2d 513, 516; Fleshner v. Kansas City, 348 Mo. 978, 982, 156 S.W. 706, 707[7]; 3 McQuillin, Municipal Corporations, 2d Ed. 1928, §§ 1274, 1283.

Plaintiff does not seek the recovery of what was parted with, but a money judgment of its reasonable value or of its value to the municipality. Affording the public that protection safeguarded by affirmative legislative enactment is the paramount right, legally and morally; otherwise we have judge-made law contravening affirmative legislative enactments and established public policy.

If the failure to contract in writing be viewed as an irregularity, it was such an irregularity as failed to comply with mandatory statutory provisions for the protection of the municipality against

extravagance or corruption, and the defenses are available under this view.

The foregoing is applicable, we think, to the municipality's charter provisions requiring the contract to be in writing and the written statements of the Director of Finance with respect to balances to the credit of the appropriation and to the cash in the appropriation, et cetera.

As briefly as we may of the cases stressed by plaintiff under "Conversion" and "Equity."

Conversion. Plaintiff says he may waive the contract and recover in tort as for trover and conversion. To give rise to an action in tort the right violated must have been created and the corresponding duty must have been imposed by law. The foundation of the municipality's liability was a contract prohibited by a statute placing a disability upon the city and imposing no legal duty upon the city. The contract may not be waived for an action in tort, especially for a money judgment, in all instances. Consult 1 C.J.S., Actions, p. 1147, § 51; 31 C.J. p. 1091, § 205.

The stated defenses are available against this count of the petition.

Equity. Plaintiff says he may sustain his count in equity if an action ex contractu or ex delicto does not lie, have an accounting and secure a money judgment of the "value of the benefits" to the municipality. . . .

For the purposes of a remedy money relief may be had at law as on constructive or quasi contracts; i.e., obligations created by law. They fall into three classes: Obligations founded upon a record, as a judgment. 2. Obligations founded upon a statutory, official, or customary duty. 3. Obligations founded upon the fundamental principle that no one ought "to enrich himself unjustly at the expense of another." 17 C.J.S., Contracts, p. 322, § 6; 12 Am.Jur. p. 502, § 6; Williston on Contracts, 1936 Ed. §§ 3, 1454; Keener on Quasi Contracts, 1893 Ed., pp. 14-16; Woodward on Quasi Contracts, 1913 Ed., § 1; 2 Harvard Law Review (Ames), p. 64; 21 Yale Law Journal (Corbin), 533; Moses v. MacFerlan (1760), 2 Burr 1005, 1008, 97 Eng.Rep. 676. 678. They are equitable in character, the obligation arising from the law and natural justice. It is essential to the action that defendant has received a benefit from the plaintiff and that the retention of the benefit by the defendant be inequitable. The cases deny a recovery for a benefit received under an ultra vires contract prohibited by positive law. Thomas v. City of Richmond, 12 Wall. 349, 79 U.S. 349, 20 L.Ed. 453, quoted supra; City of Litchfield v. Ballou, 114 U.S. 190, 193, 5 S.Ct. 820, 29 L.Ed. 132; see authorities under "Estoppel," supra, and additional Missouri cases in 84 A.L.R. 979; Strickler v. Consolidated School District, 316 Mo. 621, 625, 291 S.W. 136, 138[3], 50 A.L.R. 1287; City of Wellston v. Morgan, 65 Ohio St. 219, 228, 62 N.E. 127, 128; Williston on Contracts, 1936 Ed., §§ 1770, nn. 13, 20, 1786A; 3 McQuillin, Municipal Corporation, 2d Ed. 1928, p. 815, § 1274; Woodward on Quasi Contracts, 1913 Ed., § 161.

The judgment is affirmed.

WESTHUES and BARRETT, CC., concur.

PER CURIAM.

The foregoing opinion by Bohling, C., in Division 2, is adopted as the opinion of the court en banc.

All concur, except GANTT, J., absent.

A contrary result has been reached under an Indiana statute. A divided federal court allowed recovery in quasi-contract for motor vehicle supplies and services furnished a city after exhaustion of appropriations. Ohio Oil Co. v. Michigan City, 117 F.2d 391 (C.C.A. 7th, 1941). See also City of Lafayette v. Keen, 113 Ind.App. 552, 48 N.E.2d 63 (1943).

The requirement that a contract be covered by a prior appropriation is usually deemed mandatory and a violation cannot be obviated by ratification. Gutta-Percha & Rubber Mfg. Co. v. Village of Ogalalla, 40 Neb. 775, 59 N.W. 513 (1894), is a leading case.

Is the requirement applicable to a contract payable from funds other than property tax revenues? The answer depends upon the policy and wording of a particular statute. In Ohio the general statute governing local units in this respect has been found inapplicable to a contract for the installation of parking meters, which stipulated that the purchase price be paid from meter receipts. Hines v. City of Bellefontaine, 74 Ohio App. 393, 57 N.E. 2d 164 (1943).

SECTION 2. REPRESENTATION

Authority to contract in behalf of a local unit may by express provision of law be devolved directly upon certain officers or boards. For the most part, however, the power will be found to be vested in the local governing body and any further delegation is within its discretion. A governing body may, unless otherwise provided by law, participate directly in the making of a contract by adopting an ordinance or other appropriate measure accepting an offer or making one. Likewise, the complete terms and form may be fixed by the governing body and the bare execution left to particular officers. It is elementary that the local governing body must act as a body and not as individuals, although delegation by the full body to a committee of its members of authority to make contracts has not been uncommon in the past. In some communities fiscal practice is so loose that individual members of a governing board are permitted to purchase supplies for use in their districts on the understanding that the full body will later ratify. See Magnolia Petroleum Co. v. Police Jury of Vermilion Parish, 11 So.2d 36 (La.App.1942).

BROWN v. CITY OF ST. PETERSBURG

Supreme Court of Florida, 1933. 111 Fla. 718, 153 So. 141.

BUFORD, JUSTICE. This case is before us on appeal from final decree entered by the chancellor below dismissing the bill of complaint, which was a bill to enjoin the city manager of the city of St. Petersburg and the city of St. Petersburg, its agents, servants and employees, from proceeding in any manner in the consummation of the allowance or awarding of a certain contract therein complained of and from paying any moneys of the city in payment of any services performed or to be performed under the terms of the purported contract complained of.

The allegations of the bill of complaint show that the appellee Cotton, as city manager of the city of St. Petersburg, had assumed to enter into a contract on behalf of the said city for the publication of certain booklets for and at the price of \$1,075.

Subparagraph "g" of section 10, chapter 15505, Special Acts of 1931, which act contains the city charter provision pertinent to this case, provides as follows:

"(g) The City Manager shall make all purchases for the City in the manner provided by ordinance and shall, under such rules and regulations as may be provided by ordinance, sell all personal property of the City not needed for public use or that may have become unsuitable for public use. Before making any purchase

or sale, the City Manager shall give opportunity for competition under such rules and regulations as may be established by ordinance." (Italics ours.)

The record shows that the suit was filed on the 11th day of July, 1933, in the court below.

This court rendered an opinion in this case on August 8, 1933, 153 So. 140. In that opinion we said:

"The court construes the first italicized portion of this section of the city charter as imposing ex proprio vigore a statutory limitation on the authority of the city manager to make purchases for the city, by requiring that the city manager shall have authority to make such purchases only in the 'manner' provided by ordinance. In the absence of some manner having been laid down by ordinance for the city manager to make purchases, the authority of the city manager under the city charter is not complete, and therefore, contracts made by him, or undertaken to be made by him, in the absence of such authority, are unauthorized, although they may, perhaps, by the action of the city in recognizing them as valid after they have been already filled or executed, be held to have been ratified and thereby cured of any illegality in the city manager's authority in the first instance to have made them.

"The court construes the last paragraph of this section, which is to the effect that, before making purchases or sales, the city manager shall give opportunity for competition 'under such rules and regulations as may be established by ordinance' as limiting the authority of the city manager to making purchases after competition only to those cases in which the competitive requirements have been first imposed by a rule or regulation established by ordinance in the first instance, for the purpose of having the city manager comply with same. Under this latter clause, in the absence of any rule or regulation requiring competition, the city manager, in carrying out the authority to make purchases otherwise provided for by ordinances enacted under the first clause of this section, is not required to make purchases subject to competition, since the last clause of this section is merely a permissive limitation that may, or may not be, imposed by ordinance."

There is no contention here that the contract had been performed when the suit was filed. There is some contention that the contractor had gone to some expense in pursuance of the purported contract. It is also shown here that the city commission of the city of St. Petersburg attempted to ratify the contract by a resolution, but this attempted ratification was prior to the performance of the contract, and therefore what was said in the

former opinion in this case, in regard to possible ratification, is not applicable.

Under the provisions of the city charter, the city manager was not authorized to make the contract unless such authorization was embraced in an ordinance of the city of St. Petersburg. A resolution cannot, in cases of this sort, be substituted and have the force and effect of an ordinance, nor can a resolution supply initial authority which is required to be vested by ordinance.

All persons dealing or contracting with a municipal corporation must at their peril inquire into the power of such corporation, or its officers, to make the contract contemplated. City of Enterprise v. Rawls, 204 Ala. 528, 86 So. 374, 11 A.L.R. 1175; Edwards Hotel & City R. Co. v. City of Jackson, 96 Miss. 547, 51 So. 802; Town of Madison v. Newsome, 39 Fla. 149, 22 So. 270.

Certainly it cannot be seriously contended that the Legislature ever intended to vest in a city manager the full power and authority to purchase in the name of and with the funds of the municipality any and all things which he might be inclined to purchase, without let or hindrance. The statute clearly makes his authority to purchase any supplies dependent upon the provision of ordinance, or ordinances, duly adopted by the city commission. Under the provisions of the charter, no ordinance can be adopted without notice to the people whose money pays the bills. If the city manager, not being thereunto authorized by ordinance, can by contract bind the city's credit to pay \$1,075 and place the burden of payment on the taxpayer, he may likewise bind the city's credit for \$100,000, or any other sum, and thereby place such a burden on the taxpayers.

So the decree should be reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

It is so ordered.

Reversed.

Centralized purchasing is a highly regarded practice in contemporary public administration. Whether the purchasing agent has any discretion depends upon the language of the governing statute, charter or ordinance. See Pallas v. Johnson, 100 Col. 449, 68 P.2d 559 (1937).

Official authority to make a contract may exist as an incident to a broader delegation of power. The common council of the City of Detroit, by resolution, authorized the corporation counsel to institute proceedings to condemn certain real estate. He proceeded to employ an appraiser to make an appraisal. The latter recovered judgment on his claim for services; his employment was considered a necessary incident to the preparation of the condemnation case. Ely v. City of Detroit, 306 Mich. 300, 10 N.W.2d 892 (1943).

SECTION 3. FORMAL REQUISITES

Formal requirements depend upon statute. Apart from statute neither a seal nor a writing is necessary. II Dillon, Mun. Corps. § 783 et seq. (5th ed. 1911). As Judge Dillon has indicated, the ground is covered in part by the statute of frauds. United States v. City of New York, 131 F.2d 909 (C.C.A.2d, 1942) (land contract); Curtis v. City of Portsmouth, 67 N.H. 506, 39 A. 439 (1894) (assumption by ordinance of lease assigned to city; city records of the adoption of ordinance deemed sufficient memorandum).

MORGANSTERN ELECTRIC CO. v. BOROUGH OF CORAOPOLIS

Supreme Court of Pennsylvania, 1937. 326 Pa. 154, 191 A. 603.

STERN, JUSTICE. By an ordinance of council approved by the burgess on August 7, 1933, the Borough of Coraopolis, defendant in the present action, enacted, "That a municipal overhead electric street lighting system be constructed, erected and operated on the streets, lanes, roads, highways and alleys of the Borough of Coraopolis," and "That the proper officers of the Borough be and they are hereby authorized and directed to advertise for and procure bids for said construction and erection. October 2, plaintiff submitted a bid in writing to construct the lighting system for \$52,852.90, offering "on the acceptance of this proposal to enter into and to execute a contract in the form of said enclosed specifications, . . . " and further stating that "if this proposal is accepted the undersigned agrees to contract with the Borough of Coraopolis, Pennsylvania, in accordance with the specifications and contract form hereto annexed." On October 30, council passed a resolution that the contract "be and the same is hereby awarded to the Morganstern Electric Co.. Inc. at their bid," and "That the proper officers of the Borough be and they are hereby authorized and directed to enter into a contract with the said Morganstern Electric Co., Inc. for the work as provided for in the plans and specifications, approved

by Council, and in accordance with the terms of their bid for said work," plaintiff first to give a bond for faithful performance in the sum of 20 per cent. of the contract price. This resolution, vetoed by the burgess, was passed by council over the veto on November 16, but at the same meeting a motion was made and carried that the officers of the borough should not sign the contract until December 1. On November 29 another resolution was passed postponing the signing of the contract until December 19; on December 18 the signing was again directed to be postponed "until ordered by council," and on June 4, 1934, the ordinance awarding the contract was repealed. Plaintiff's present suit is to recover the loss of profits which it alleges it would have earned had it been allowed to perform the work for which its bid was accepted.

Confronted by the obvious weakness of its position in that the proposed final contract between the parties was not executed, plaintiff contends that its written bid of October 2, coupled with the resolution of council of October 30, which was reduced to writing and signed by the president of council and attested by the secretary, constituted a contract sufficient in law upon which to base a right of action.

It is true that where the terms of a contract are definitely agreed upon, legal obligations may arise even though it be the understanding of the parties that a formal contract is subsequently to be executed. Taylor v. Stanley Co. of America, 305 Pa. 546, 158 A. 157. It is also true that in Lansdowne v. Citizens' Electric Light & Power Co., 206 Pa. 188, 55 A. 919, upon which plaintiff heavily relies, it was held that the borough's acceptance of a bid created a contract upon which it could sue the bidder, even though a contemplated formal contract in writing was never executed. There is a defect in plaintiff's case, however, which eliminates the Lansdowne decision as a controlling precedent. There, the bidder was notified by the borough of its acceptance of the bid; here, the borough's acceptance was not communicated to plaintiff. It is elementary that no obligation is created by the acceptance of an offer unless and until it is transmitted to the offeror. It is immaterial, in this regard, that the acceptance in the present case was embodied in an ordinance of the borough council. That ordinance, as plaintiff admits, was not legislative in character, but merely a ministerial act. The same legal requirements applied as to the making of any other contract. The ordinance could confer no contractual rights upon plaintiff until defendant, with the intent and for the purpose of creating

Howard v. Borough of Olyphant, 181 Pa. 191, 37 A. 258; Lansdowne v. Citizens' Electric Light & Power Company, 206 Pa. 188, 55 A. 919; Wilkes-Barre Connecting R. Co. v. Kingston Borough, 319 Pa. 471, 474, 181 A. 564.

a contract, informed plaintiff that it accepted plaintiff's bid. The reason for its failure to do so is apparent. It did not desire to commit itself definitely and finally to the proposed erection of a lighting system. As already stated, at the same time at which it passed the resolution awarding the contract, it adopted a motion directing the borough officers not to proceed with the execution of the written agreement until a subsequent specified date, showing clearly that it had in contemplation further consideration of the subject and did not intend its mere resolution to create any contractual obligation.

There is another reason why the Lansdowne Case is not an authority governing the present situation. Since it was decided, the Act of April 14, 1921, P.L. 147, has been passed, providing "That all contracts . . . made by any borough involving an expenditure of over five hundred dollars (\$500) shall be in writing." This requirement was carried into the General Borough Act of May 4, 1927, P.L. 519, § 1202, cl. 53 (as amended by Act May 8, 1929, P.L. 1636, § 7 [53 P.S. § 13365]) and it must be understood as meaning that before a borough can be charged with contractual liability there must be, not merely the passage of an ordinance or resolution awarding a contract (even though such ordinance or resolution itself be reduced to written or typed form in the minutes of council or in the borough's ordinance book), but a final contract in writing executed by the parties. Indeed, to hold that this provision is satisfied if the resolution of council accepting the bid is in writing, would stamp it as unnecessary and without purpose, since a borough council is compelled in any event, by section 1006, cl. 2, of the General Borough Act (as amended by Act May 8, 1929, P.L. 1636, § 1 [53 P.S. § 12896]) "to make and preserve full records of their proceedings." Nor would such a construction give to the borough the protection which this legislation was manifestly designed to afford. Such a provision is not merely directory but mandatory: it must be strictly complied with; no liability can be imposed upon the borough by an agreement entered into in any other form. "He who deals with a municipality must recognize that it can contract only upon such terms as the Legislature has seen fit to prescribe." Commonwealth v. Jones, 283 Pa. 582, 129 A. 635, 636. "The authority of a municipal body to legislate or to conmust be exercised in the manner provided in the tract . . . statute conferring it." Carpenter v. Yeadon Borough, 208 Pa. 396, 57 A. 837, 838; Wilkes-Barre Connecting R. Co. v. Kingston Borough, 319 Pa. 471, 181 A. 564.

The court below, after trial of the issue, entered judgment for defendant notwithstanding the verdict rendered by the jury in favor of plaintiff. The court was right in so doing, and the judgment is affirmed.

See also Arkansas-Missouri Power Corporation v. City of Kennett, 348 Mo. 1108, 156 S.W.2d 913 (1941).

SECTION 4. COMPETITIVE BIDDING

It is elementary that competitive bidding is a matter which depends entirely upon positive law. Cullen v. Rock County, 244 Wis. 237, 12 N.W.2d 38 (1943). Eagle v. City of Corbin, 275 Ky. 808, 122 S.W.2d 798 (1938), reproduced at the outset of Chapter 2, is highly exceptional.

In a given jurisdiction one is likely to find competitive bidding requirements both in statutes governing local public works and in laws regulating the making of contracts for supplies, equipment and services. For the most part the problems relating to competitive bidding are the same under both types of statutes and the subject will be approached on that basis.

An exception is commonly made, for obvious practical reasons, with respect to contracts involving an expenditure less than a certain amount—\$500, for example.

See Bigham v. Lee County, 184 Miss. 138, 185 So. 818 (1939) (effort to evade statute by dividing purchase of lumber for bridge repairs into small lots failed.)

The same is true as to emergencies. If the statute is to be construed as granting power to declare an emergency a reviewing court would hardly set aside local action unless tainted with abuse of discretion or corruption. If the law is interpreted to mean that competitive bidding may be dispensed with where an emergency exists as an objective fact the problem will be-how much weight should be given the local finding? In California a resolution reciting the facts and declaring them to constitute an emergency is prima facie evidence that an emergency exists and puts the burden on the challenging party. Los Angeles Dredging Co. v. City of Long Beach, 210 Cal. 348, 291 P. 839 (1930). In Massachusetts the finding is given no weight under a statute forbidding expenditures in excess of appropriations except in case of extreme emergency. Continental Construction Co. v. City of Lawrence, 297 Mass. 513, 9 N.E.2d 550 (1937). See Raynor v. Commissioners for Town of Louisburg, 220 N.C. 348, 17 S.E.2d 495 (1941).

An exception is recognized without the aid of express statutory provisions, as to professional and other personal services requiring the exercise of peculiar skill. State ex rel. Doria v. Ferguson, 145 Ohio St. 12, 60 N.E.2d 476 (1945); 3 McQuillin, Mun. Corps. § 1292 (Rev.Vol.1943).

Another practical exception is commonly recognized as to a contract for utility services. As the Washington court put it, a literal application of the statute will not be exacted where there is but one available source. Washington Fruit & Produce Co. v. City of Yakima, 3 Wash.2d 152, 100 P.2d 8, 128 A.L.R. 159 (1940). Contra: Hunt v. Fenlon, 313 Mich. 644, 21 N.W.2d 906 (1946). Would the Washington theory apply in any case where competition would be impossible or unavailing? See Mullen v. Town of Louisburg, 225 N.C. 53, 33 S.E.2d 484 (1945). The theory was put forward without avail in the leading case of Dean v. Charlton, 23 Wis. 590, 99 Am.Dec. 205 (1869), with respect to a contract for a patented article. In that case competitive bidding procedure was used but the substantive point is the same if there can be no competition in fact. Under the Wisconsin theory the supreme consideration is competition and any article which is not a subject of competitive bidding may not be specified. Neacy v. City of Milwaukee, 171 Wis. 311, 176 N.W. 871 (1920). The Charlton case was limited in Kilvington v. City of Superior, 83 Wis. 222, 53 N.W. 487 (1892), to the particular point there decided, namely that under a statute requiring competitive bids for street improvements the cost of which was to be assessed to owners of abutting property a patented pavement so controlled that there could be no competition could not be specified. means of obviating the decision entirely, which was discussed in the opinion in that case, has been provided by statute. The local unit is authorized to obtain from him who controls the patent, before advertising for bids, an agreement to permit anyone desiring to bid the use of the patented article or process, and to furnish to a contractor the patented article itself for a reasonable price which must be publicly stated. Wis.Stat. § 62-15(7). The parties should be able to make a valid arrangement to this effect without the aid of statute but there is authority to the contrary. Village of Rossville v. Smith, 256 Ill. 302, 100 N.E. 292 (1912); Siegel v. City of Chicago, 223 Ill. 428, 79 N.E. 280 (1906).

In the leading case of Hobart v. City of Detroit, 17 Mich. 246, 97 Am.Dec. 185 (1868), the Wisconsin view was rejected and the specification of a patented article sustained. The Michigan rule has gained wider acceptance. 3 McQuillin, Mun.Corps. § 1299 (Rev.Vol.1943); Note 77 A.L.R. 702 (1932). See also Hoffman v. City of Muscatine, 212 Iowa 867, 232 N.W. 430 (1930); 44 Harv.L.Rev. 655 (1931).

Publication requirements are too often lacking in clarity. Unless the governing statute is explicit questions are likely to arise as to the publication medium, frequency of publication and the period of time between first publication and the event to which the publicity relates. Often the problem will be whether the essential requirement of the statute relates to the duration of a period during which notice must be given or to the number of separate newspaper publications which must be made. See State v. Wall, 98 Miss. 521, 54 So. 5 (1910), for an example of an explicit statute. See also Merchants' Bank & Trust Co. v. Scott County, 165 Miss. 91, 145 So. 908 (1933); and Bechtold v. City of Wauwatosa, 228 Wis. 544, 277 N.W. 657, 280 N.W. 320 (1938). What is a newspaper of general circulation within the unit under a statute requiring publication in such a medium? See Mateer v. Borough of Swissvale, 335 Pa. 345, 8 A.2d 167 (1939).

It is necessary that the advertisement or specification on file afford all who might be interested adequate data to bid intelligently on an even footing and to enable the proper authorities to determine later whether performance meets the specifications. In public works contracts, in particular, it may not be feasible to spell out the details in a published notice. Thus, the usual procedure is to publish a general notice which refers to detailed specifications on file at an accessible place.

The nature of the work to be done or the thing to be furnished may be such as not to permit great detail. In Hines v. City of Bellefontaine, 74 Ohio App. 393, 57 N.E.2d 164 (1943), a published notice to bidders read, insofar as pertinent here, as follows:

"Public notice is hereby given that the city of Bellefontaine, Ohio, will receive sealed bids for the nine months rental, with option to purchase, 350 parking meters, more or less, until twelve o'clock noon March 17, 1942. No specifications will be published other than the following instructions to bidders.

"Said meters shall be of the manual or automatic type and shall specify the coin or coins to be deposited therein, and the amount of parking time allowed for each amount deposited.

"Each bidder shall submit specifications of his meter, its method of operation and method of installation, and shall also submit a sample parking meter of the same general type he proposes to furnish under his bid. . . .

"The bids submitted shall include the cost of installation, and said meters shall be installed at locations designated by the City of Bellefontaine.

"The bidders shall state for what period of time, if any, they will service the meters in operation and shall further specify within what period of time said meters shall be serviced or repaired after report has been made of such need by said City.

"Each bidder shall also state what accessories, if any, they will furnish with his bid, such as coin-carrying cases, parts, etc. Each bidder shall furnish a parts list with his bid. . . ."

A taxpayer sought to enjoin the making of a contract with a company which had bid in response to the notice. The court rejected the contention that the notice was so indefinite that fair competition was impossible with the following observations:

"As appears from the statement of facts, the present stage of development of parking meters is such that it is impossible to draw structural specifications upon which competitive bidding may be based, as specifications particularly and exactly describing one meter would necessarily exclude others, thus precluding competitive bidding.

"The law does not require the performance of the impossible, so that where the property which a municipality desires to acquire is, as in this case, of such character that structural specifications cannot be drawn so as to permit competitive bidding based thereon, the omission of the structural specifications from the advertisement for bids does not render the proposal to receive bids indefinite or invalid by reason of not providing such basis for competitive bidding.

"While structural specifications as a basis for competitive bidding are not incorporated in the proposal to receive bids, the terms of the proposal are definite and are of such character as to permit fair competition among the bidders. . . ."

IOWA ELECTRIC CO. v. TOWN OF CASCADE

Supreme Court of Iowa, 1939. 227 Iowa 480, 288 N.W. 633.

MILLER, JUSTICE. This suit is brought by the Iowa Electric Company, a corporation, which alleges that it has a franchise for the furnishing of electric current in the Town of Cascade, which will expire May 22, 1940, and that it is a taxpayer in the Town of Cascade. Plaintiff seeks to enjoin the construction of a municipal electric light and power plant, construction of which was approved by the electors of the Town of Cascade at a special election. The cost of improvement was not to exceed \$100,000, and was to be paid out of earnings, pursuant to the Simmer law. Code 1935, § 6134—dl et seq.

The Federal Emergency Administrator of Public Works, upon application by the town, offered to make a grant of 45 per cent of the cost of the project, which offer was accepted. One of the conditions of the grant was that the town established certain minimum rates of wages to be paid employees engaged upon the

project, which rates were to be determined "in accordance with rates prevailing for work of a similar nature in the locality in which the project is to be constructed", and were to be submitted to, examined and approved by the state director. The town adopted a resolution establishing such minimum rates and provided in the specifications for the project, that the wages to be paid such employees should be not less than the rates so fixed. Three contracts were let, each of which obligated the contractor to comply with such provision of the specifications.

Numerous grounds were asserted by the plaintiff in its petition for injunction, but the sole contention, upon which reversal is sought in this court, is that "the adoption by the town council of the minimum wage scale constituted such an interference with free and open competitive bidding upon said project as to render the proceedings void."

There was testimony introduced to the effect that the wage scales, paid in the Town of Cascade, were substantially lower than the minimum rates fixed by the specifications. There was also testimony that the town council, in its study preliminary to the fixing of minimum wage rates, determined that the labor supply in Cascade was insufficient to satisfy the needs of the project. There was testimony to substantiate this conclusion. The contractors testified that the schedule of minimum wage rates did not in any manner tend to increase the bids submitted by them, but one of them conceded that the requirement increased the labor bill. It was also shown that the cost of the labor, affected by the schedule, represented 15 to 20 per cent of the total cost of the improvement. We are of the opinion that the trial court properly found for the defendants under the facts herein.

This court has expressly recognized that in this state a municipal corporation possesses only such powers as are conferred upon it by the legislature. . . .

The court has also recognized that, under the Simmer law, an improvement such as here contemplated should be contracted for on a basis of competitive bidding. In the case of Iowa Electric Light & Power Co. v. Town of Grand Junction, 216 Iowa 1301, 1303, 250 N.W. 136, 137, after quoting Sections 6134—d4 and d5 of the Code, we state: "This statute was undoubtedly enacted for the purpose of obtaining competitive bidding and to enable municipal corporations to secure the best bargain for the least money. Such a statute clearly required competitive bidding. McQuillin on Municipal Corp. (2d Ed.) vol. 3 § 1309; Colorado Central Power Co. v. Municipal Power Dev. Co. (D.C.) 1 F.Supp. 961, 965 and 966; Lee v. City of Ames, 199 Iowa 1342, 203 N.W. 790; Urbany v. Carroll, 176 Iowa 217, 157 N.W. 852; Rhodes v. Board of Public Works of Denver, 10 Colo.App. 99, 49 P. 430, on

page 434; 65 A.L.R. 837 note; Chicago Sanitary District v. Mc-Mahon & M. Co., 110 Ill.App. 510."

Appellant cites and relies upon numerous decisions which hold that insertion in the specifications of a minimum wage scale such as here attempted is beyond the power of a city, where the city is obligated to contract on the basis of competitive bidding, because such a provision tends to destroy competitive bidding. However, to intelligently apply the rule of such cases, it is necessary to understand the reasons for the rule.

In the case of Hillig v. St. Louis, 337 Mo. 291, 85 S.W.2d 91, 92, the court states: "In this state it is well settled that charter provisions requiring that contracts for public work be awarded, upon a public letting, to the lowest responsible bidder, are intended to secure free and unrestricted competition among bidders, to eliminate fraud and favoritism, and to avoid undue or excessive cost which would otherwise be imposed upon the taxpayer or property owner. . . . As a corollary to the elementary principle just stated, our courts hold in general that where, in the letting of contracts for public work, restrictions or conditions are imposed upon bidders which tend to increase the cost of the work, such conditions and restrictions are violative of charter provisions requiring that the contract for the work be let to the lowest responsible bidder. . . .

In the case of Wilson v. Atlanta, 164 Ga. 560, 139 S.E. 148, the syllabus prepared by the court states as follows: "A municipal corporation, though not required by the charter to let contracts for a public work to the lowest bidders, and though clothed as to such matters with the broadest discretionary powers, has no authority to adopt an ordinance prescribing a fixed scale of wages that shall be paid for all public work of the city. Such an ordinance by the city of Atlanta is ultra vires and illegal, because it tends to encourage monopoly and defeat competition, and also tends to put a heavier burden upon the taxpayers than they would have to bear if free competition were allowed; and all contracts made in pursuance thereof are void. City of Atlanta v. Stein, 111 Ga. 789, 36 S.E. 932, 51 L.R.A. 335; Green v. City of Atlanta, 162 Ga. 641, 652, 135 S.E. 84."

Under the record herein, there is no dispute but that the provisions of the Simmer law were fully complied with in regard to competitive bidding, except for the fact that the specifications called for a minimum rate of hourly wages to be paid certain classes of employees to be employed on the project. This provision tends to increase the labor cost. But this is the only element, shown by the record herein, which could call for a condemnation of the ordinance and the specifications of the contract, as tending to prevent competitive bidding. In all other respects, the

procedure followed was consistent with the purpose of the rule to eliminate fraud and favoritism, discourage monopoly and encourage competition. The only plausible argument in support of appellant's position is that, since the rates are fixed higher than the rates paid local laborers, the labor cost was increased, and this might have a tendency to prevent the awarding of the contract in such a way as to avoid undue and excessive costs, guard against improvidence, extravagance and unnecessary burdens to the taxpayers, and obtain terms at the most reasonable, economical and practical costs to the advantage of the taxpayer in having the work economically done. In fact, appellant practically concedes as much. In their brief and argument, counsel state: "When a contract for the construction of a municipal electric light and power plant is let under the provisions of the Simmer law, free and open competition among bidders is required to the end that the municipality may receive the best bargain for the least money."

The difficulty with appellant's position under the record herein lies in the fact that the total labor cost did not exceed 20 per cent of the cost of the improvement and the provisions in the specifications for a minimum scale of wages was inserted as a condition precedent to the securing from the federal government of a grant of 45 per cent of the cost of the improvement.

Section 10188 of the Code authorizes municipal corporations to accept gifts and provides that "conditions attached to such gifts or bequests become binding upon the corporation . . . upon acceptance thereof." This court has expressly recognized, in the cases of Abbott v. Iowa City, 224 Iowa 698, 277 N.W. 437; and Keokuk Waterworks Co. v. Keokuk, 224 Iowa 718, 277 N.W. 291. that Section 10188 of the Code authorizes municipal corporations to accept the very kind of grant which was here offered to the Town of Cascade. We are of the opinion that this section of the Code not only authorized the city to accept the grant, but also, under the record herein, authorized it to comply with the requirements in regard to minimum wage rates as a condition precedent to the securing of the grant. Since the grant was over twice the amount of the total labor cost on the project, the provision in the specifications for the payment of a minimum wage scale could not possibly be considered as having increased the cost to the users of electricity. The reason for the application of the rule, for which appellant contends, is absent. The court was warranted in refusing to apply the rule herein, and in holding that the town could comply with the condition that was attached to the grant.

The decree was right. It is affirmed.

In 1926 the Supreme Court declared invalid as a criminal law a state statute which required that not less than the current rate of per diem wages in the locality where the work is performed be paid by contractors to specified employees in the performance of contracts with the state. Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126 (1926). The prevailing wage requirement was considered so uncertain that to make one's liberty depend upon his guess as to its meaning denied due process of law. It can be stated with assurance, however, that the term is definite enough for purposes of civil liability and, thus, a prevailing wage provision inserted by a local unit in a construction contract under statutory authority will stand up. Campbell v. City of New York, 244 N.Y. 317, 155 N.E. 628 (1927). In this litigation the contract provided for arbitration of any controversy arising under the agreement. It had been unsuccessfully urged below that the provision imposed extra expense on the contractor and thus was reflected in the amount bid. Morse v. Delaney, 128 Misc. 317, 218 N.Y.S. 571 (1926). The Court of Appeals brushed the point aside with the remark that the expediency of such a stipulation was a matter for local determination.

The courts have not been receptive to a local requirement that only union members be employed under a public works contract as a permissible restriction of competition. See Note 110 A.L.R. 1406 (1937). In Colorado, however, it has been determined that state officials did not abuse their discretion in awarding a plumbing and heating contract to a contractor employing union labor on a bid of \$17,700 instead of making the award to an open shop contractor whose bid was \$300 lower, even though the law required an award to the lowest responsible bidder. Pallas v. Johnson, 100 Colo. 449, 68 P.2d 559 (1937). Official action was based on the theory that an award to the lowest bidder was likely to be followed by labor disputes which would delay the completion of urgently needed facilities.

There is substantial authority that a stipulation as to maximum working hours does not violate a competitive bidding requirement. 3 McQuillin, Mun.Corps. § 1302 (Rev.vol. 1943). In weighing the question whether wage and hour provisions run counter to the policy of a competitive bidding law it should be borne in mind (1) that any stipulations in the contract potentially deter some possible bidders and, thus, restriction of bidding is not a fixed criterion and (2) that good terms as to hours and wages may favorably affect the quality of the job done. Quality is properly taken into account in specifying materials.

It is worthy of note that the cumulative effect upon competition of stipulations laid down by the local unit may carry the balance against validity. See Weiss v. Incorporated Town of

HARRIS v. CITY OF PHILADELPHIA

Supreme Court of Pennsylvania, 1930. 299 Pa. 473, 149 A. 722.

SIMPSON, J. Plaintiff filed a taxpayer's bill in equity to enjoin the city of Philadelphia and certain of its officials from entering into a contract for the doing of specified municipal work, which contract, it was alleged, was about to be made with an illegally selected bidder. The trial judge granted an injunction; the court in banc vacated it and dismissed the bill; and plaintiff now appeals. Pending the appeal, the contract was awarded to a bidder, which, upon its motion, was allowed to intervene as a party defendant.

The award was made according to what is known as the prequalification plan. Briefly stated, this is a method for deciding, in advance of the bidding, who are responsible bidders, and for refusing to receive bids from any others. Under it, aside from all other considerations, the departmental head advertising for bids for a particular contract, is bound to award it to the prequalified bidder who, in the manner specified in the advertisement, bids the lowest sum for doing the work. Appellant contends: (1) That no plan can be devised according to this method, which would not violate the provisions of section 6 of the Act of May 23, 1874, P.L. 230, 233 (Pa.St.1920, § 2955) and (2) in any event, the method specified in the ordinance of June 14, 1929, under which the contract was awarded in the present case, violates that section of the statute.

We find no difficulty with the first of these contentions. section referred to provides that all work and materials required by the city "shall be performed and furnished under contract to be given to the lowest responsible bidder, under such regulations as shall be prescribed by ordinance; and it shall be the duty of councils forthwith to enact such ordinances." It will be noticed that, while the city is required to award all contracts "to the lowest responsible bidder," the method of ascertaining who is in that category is to be "prescribed by ordinance." Since we cannot hold that the first ordinance enacted pursuant to the statute was unchangeable (for which no one does or could properly contend), we must decide that councils have the right, at any time, to pass a legal ordinance which will provide for the determination of the question as to who are "responsible bidders" on municipal work, before the receipt of the bids, instead of thereafter, as had been the previous practice. It follows that the ordinance of June 14, 1929, is unobjectionable in so far as it merely provides for a preliminary determination of the responsibility of prospective bidders. Whether the particular method ordained is or is not objectionable will be considered later.

In doing this, we are compelled to consider the provisions of the ordinance at some length. It requires that every one proposing to bid for a municipal contract shall answer, under oath, a questionnaire "in standard form showing that such intended or prospective bidder has the necessary facilities, experience and financial resources to perform the work in a proper and satisfactory manner within the time stipulated. Such statements must designate and describe the plant, equipment and facilities of the bidder, relate his experience in doing the same or similar work, and disclose his financial resources, specifying the amount of his liquid and other assets and liabilities and the number and amount of his other existing contracts or commitments, including and indicating those with the city; said statements to be confidential." It further specifies that the answers received shall be scrutinized by the director of the department which is to supervise the performance of the contract, and, if he is satisfied, the prospective bidder's name shall be placed on what is known as the "white list" of that contract. This determines that he is a "responsible bidder" so far as it is concerned; he is allowed to submit a bid, and no further inquiry is permitted regarding his responsibility. If his answers are not satisfactory, he is rejected as a responsible bidder thereon, and, unless the director's decision is overruled, no bid will be received from him. He may, however, within a time specified, request a "hearing before a board to be composed of the said awarding officer and two other heads of departments, chiefs of bureaus of other departments, or other city officials conversant with construction work, and to be designated by the mayor, or, in the absence of the mayor, by the director of any city department," the board having the right to hear additional evidence regarding relevant matters, and to "affirm, reverse, revise or modify the decision of the awarding official, in its discretion." It is not to have before it, however, for consideration or comparison, the confidential answers of any other of the proposed bidders, except such as have been compelled to appeal from the decision of the director; nor can it remove from the white list any name he has placed on it.

It is obvious that, even if this plan is, in some respects, an advance on the previous method, it nevertheless opens wide the door to possible favoritism. The awarding director can place upon the white list the name of any intending bidder whom he chooses to approve, however irresponsible in fact, and that decision is not reviewable. On the other hand, he may compel all bidders, who are not favorites of his, to go to the expense of an appeal to the board, which will have before it only the answers to the questionnaire by those the awarding director has excluded from bidding, with no way of knowing whether or not their plant.

equipment, experience, and financial standing are superior or inferior to those of the bidders whose names the director has placed on the white list. This might well result in everybody being excluded except those who are personal or political friends of the awarding director, or whom he knows are conspiring together to seemingly bid in competition, but in reality to destroy all competition; and it certainly would result in giving the contract to one of the favored bidders, if his bid happened to be the lowest of those actually received, though he was not in fact, a responsible bidder, or no more responsible than those who were not permitted to submit bids and might have offered to do the work for a less sum.

Finally, it is contended by appellees, that even if we held the ordinance was for any reason defective, still we should affirm the decree below, because it did not appear that plaintiff, who sued simply as a taxpayer, was injured, there being no averment or proof that any of the three rejected bidders would have bid less than the intervening defendant. Aside from the contention that to so hold would permit the city officials to take advantage of their own wrong, it suffices that a taxpayer's right cannot be limited in the way suggested. He may object to the making of any contract, which would result in the wrongful taking of the city's money, whether his individual loss would be great or small. Page v. King, 285 Pa. 153, 131 A. 707. As is well said by Audenried, J. in Croasdill v. City of Phila., 18 Pa.Dist.R. 719, 720: "Each taxpayer has the right to demand that the requirements of law with respect to the method of letting municipal contracts shall be complied with in the case of every contract, apart from the question of the immediate or direct loss that a failure to comply therewith may involve in any specific case." This is the basis of the present bill, and is a well recognized head of equity jurisdiction, specified, as such, in section 13 of the Act of June 16, 1836, P.L. 785, 790 (Pa.St.1920, § 4563). Barnes Laundry Co. v. Pittsburgh, 266 Pa. 24, 41, 109 A. 535.

The decree of the court below is reversed, and the record is remitted that an injunction may be entered as prayed for in the bill.

Cf. J. Weinstein Building Corporation v. Scoville, 141 Misc. 902, 254 N.Y.S. 384 (1931).

The usual requirement is that a competitive bidding contract be awarded to the "lowest responsible" bidder, although variations such as "lowest" and "lowest and best" have been used. Even where the reference is to the "lowest" bidder other factors than the dollar amounts of the bids may be taken into account. Berghage v. City of Grand Rapids, 261 Mich. 176, 246 N.W. 55 (1933). (Printing contracts covering proceedings of the city governing body and secondary matter awarded to a high bidder which had much the largest circulation.)

In determining who is the lowest responsible bidder it is clear that "responsible" is not confined to financial responsibility and that the local authorities making the determination exercise a considerable measure of discretion. Prior unsatisfactory experience with a bidder as to quality or timeliness of performance may be taken into account. Sandfort v. Atlantic City, 134 N.J.L. 311, 47 A.2d 553 (1946); Wilson v. City of New Castle, 301 Pa. 358, 152 A. 102 (1930). So it is with the integrity, experience, skill, judgment, business organization and facilities of the bidder. See cases collected in 3 McQuillin, Mun.Corps. § 1330 (Rev. vol. 1943). In awarding a printing contract to a newspaper, circulation may be considered. Berghage v. City of Grand Rapids, supra; State ex rel. George M. Jensen Printing Co. v. Snively, 175 Minn. 379, 221 N.W. 535 (1928).

Many competitive bidding statutes expressly authorize local units to reject any and all bids and proceed afresh. A statement in McQuillin that a provision of this sort confers authority to award the contract to any bidder and reject the others, even though lower, has been quoted with approval in Leavy v. City of Jackson, 247 Mich. 447, 226 N.W. 214 (1929). See 3 McQuillin § 1331 (Rev. vol. 1943). This, it is believed, is a misconception. The purpose of the reservation is to enable the local unit to reject all bids if none considered advantageous is received. The McQuillin interpretation, in effect, takes most of the meaning out of the lowest responsible bidder requirement.

Under the general principle that a local taxpayer has standing to sue to enjoin the illegal expenditure of public funds a taxpayer may obtain an injunction against the improper letting of a public contract. Strictly speaking, he would not have standing to sue as a taxpayer unless tax monies were involved but this conception is not strictly applied. In Ohio, and perhaps other states, a taxpayer of a municipality may make written request to the municipal law officer to sue to restrain the misapplication of municipal funds or the execution or performance of any contract made in behalf of the unit in contravention of law and, may bring the suit himself in behalf of the unit if the law officer fails to act. Ohio Gen.Code § 4314 (Page, 1938). This simply liberalizes the rule, existing apart from statute, as to derivative suits.

The position of a bidder is somewhat different. Competitive bidding is required in the public interest, which includes that of the taxpayer. Is it, however, for the benefit of the bidder?

COLORADO PAVING CO. v. MURPHY

Circuit Court of Appeals of the United States, Eighth Circuit, 1897. 78 F. 28.

SANBORN, CIRCUIT JUDGE. This is an appeal taken by the mayor and the members of the board of public works of the city of Denver and the Colorado Paving Company, a corporation, from an order of the court below enjoining them from paving, and from entering into any contract for paving, a street named "Broadway," in that city, until the final hearing upon the bill of complaint in this suit. The appellee was the complainant in this bill, and he bases his right to this injunction and to other relief upon the sole ground that he was the lowest reliable and responsible bidder for this paving, and therefore entitled to this contract, under the provisions of the charter of the city of Denver.

The record presents a preliminary question which demands decision before we can enter upon the consideration of the weight and effect of the testimony it contains. The question is this: Has the lowest, but unsuccessful, bidder for municipal work, any such vested right to or interest in the contract for it as will enable him to maintain a suit to compel its award to him, and to enjoin the successful bidder and the municipality from entering into a contract for the performance of the work because that contract has been awarded to a higher bidder in violation of the usual provision in city charters that such work shall be let to the lowest reliable and responsible bidder? In other words, has the lowest bidder the legal capacity to maintain such a suit as that at bar? That taxpayers, whose taxes are to be increased and whose property is to be depreciated in value by the fraudulent or arbitrary violation of this provision by the officers of a municipality, may maintain a bill to enjoin their proposed action, is a proposition now too well settled to admit of question. Times Pub. Co. v. City of Everett, 9 Wash. 518, 37 P. 695; 1 Beach, Pub.Corp. §§ 634, 635; 2 Dill.Mun.Corps. § 922; 2 High. Ini. §§ 1251-1253; David v. Mayor, etc., 1 Duer, 451; Crampton v. Zabriskie, 101 U.S. 601; Mayor, etc., v. Keyser, 72 Md. 106, 19 A. 706; People v. Dwyer, 90 N.Y. 402. These suits, however, stand upon the ground that the statutes on which they are based were enacted, and the duties there specified were imposed upon the public officers, for the express benefit of the property holders and taxpayers who bring the suits. The appellee pays no taxes for this paying. He has no property that will be injured by the violation of the provisions of the charter relied upon, and no one who has is here to complain of their violation. So far as the purpose of its enactment is concerned, the complainant is a stranger to the statute,—one whose interests were not considered or intended to be conserved by its enactment. He is a mere bidder for some of the public work of this city,—a contractor, or one who desires to be a contractor. His interest and that of his class, the contractors with municipalities for public work, is to get the highest price for their work and materials. is obvious that this statute was not enacted for their benefit. If it had been, the legislature would have provided that the contracts should be awarded to the highest, rather than to the lowest, bidders. In reality this suit is nothing but a contest between rival contractors for the patronage of the city of Denver. One of them has obtained the award of a contract from that city, and the other is in this court asking a decree that the city be enjoined from making a contract with his rival, and be compelled to make it with him, because some of the public officers of that city have violated certain provisions of the city charter enacted for the sole benefit of its property holders and taxpayers. It is plain that, in the absence of these provisions in the charter, the officers of this city would have had the right to award this contract to any bidder, high or low, and the complainant would have had no cause for complaint. There is no doubt that these provisions were enacted for the benefit of the property holders and taxpavers of the city of Denver, and not in the interest or for the benefit of bidders or contractors for municipal work. How, then, can this bidder maintain a suit for their violation? He cannot. It will be soon enough to consider the effect of such a violation when some of those for whose benefit these statutes were enacted complain of it. Until then, the courts must withhold their hands. The rule of law which governs this case, and points unerringly to this result, is unquestioned; and it is nowhere stated more clearly than in Strong v. Campbell. 11 Barb. 135, 138, where Judge Johnson says:

"Whenever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another, and the advantage to be derived to the party prosecuting, by its performance, is merely incidental, and no part of the design of the statute, no such right is created as forms the subject of an action."

It is upon this principle that it is now settled by the great weight of authority that the lowest bidder cannot compel the issue of a writ of mandamus to force the officers of a municipality to enter into a contract with him. High, Extr. Rem. § 92; State v. Board, 24 Wis. 683; Com. v. Mitchell, 82 Pa. St. 343, 350; Kelly v. Chicago, 62 Ill. 279; State v. McGrath, 91 Mo. 386, 3 S.W. 846; Douglass v. Com., 108 Pa. St. 559; Madison v. Harbor

Board, 76 Md. 395, 25 A. 337. And the courts hold that he cannot maintain an action at law for damages for their refusal to enter into the contract. Talbot Pav. Co. v. City of Detroit, 109 Mich. 657, 67 N.W. 979; Gaslight Co. v. Donnelly, 93 N.Y. 557. This principle is as fatal to a suit in equity as to an action at law. It goes not to defeat any particular cause of action, but to defeat the right to any relief. Nor is this an unjust or inequitable result. One who offers to contract to do work for a city that he knows has the right to reject his bid ought not to have the power to compel that city to enter into a contract with him simply because it decides to make a contract for the same work with his rival. He knowingly puts the labor and expense of preparing his bid at the hazard of the city's action. It is admitted that, if the city rejects all bids, he has no rights, no equities; and we fail to see how its acceptance of another's bid can give to the unsuccessful bidder any greater right than he would have had if all bids had been rejected.

Since the complainant cannot obtain this contract himself, the injunction which restrains the city from making a contract for the same work with his rival-contractor can give him no relief, and it must be dissolved. Let the order granting the preliminary injunction be reversed, with costs, and let the case be remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion.

SELLITTO v. CEDAR GROVE TOWNSHIP

Supreme Court of New Jersey, 1944. 132 N.J.L. 29, 38 A.2d 185.

CASE, JUSTICE. This writ brings up an award to C. D. Maringi of a contract to collect and dispose of the garbage, ashes and refuse of the Township of Cedar Grove, County of Essex. Marangi had been doing that work. His contract year was to expire on April 1, 1944, and the Board of Commissioners of the Township, pursuant to a resolution passed by them, advertised for bids for the ensuing year, all such proposals to be addressed to the Board, in care of the Township Clerk. In due season the Board met and received and opened the bids, which were as follows:

Nick Sellitto	\$6,500.00
M. Iommetti & Sons	6,499.00
C. D. Marangi	7,200.00

The matter of award was, on motion, laid over for two weeks, and at the adjourned meeting the board, on the assigned reason that the bids were too high for the service to be rendered, rejected all bids and directed the Clerk to readvertise. At the

appointed time the Board again met, received and opened bids. Then there were only two bids, as follows:

N. Sellitto \$5,749.00 C. D. Marangi 6,400.00

The minutes show that: "On motion of Mayor Tierney, duly seconded, action on the above listed proposals was laid over for investigation." At a meeting held three weeks later the Board received a report from Mayor Tierney to the effect that on his calculation Sellitto would not make any profit at his bid figure of \$5,749 and further that Sellitto had never before had a contract with a municipality; and thereupon the Board made the award to Marangi at his bid of \$6,400.

Thus, one set of bids was rejected on the theory that the low bids of \$6,499 and \$6,500 (Sellitto's) were too high; and on readvertisement Sellitto's low bid of \$5,749 was rejected because it was too low; and the award went to Marangi, always the high bidder, at only \$99 less then the earlier bid of M. Iommetti & Sons, and \$100 less than the original bid of Sellitto. That bare summary permits the inference that the constant purpose, as well as the ultimate result, was to make the award to Marangi. The legal question is whether the award was made to "the lowest responsible bidder", in obedience to R.S. 40:50–1, N.J.S.A.

The point sought to be made against Sellitto is that he was not "responsible", and the facts upon which the point is rested are that he had not made his price high enough to allow himself a profit and that he had not previously had a municipal contract. Sellitto's sound financial and moral integrity are not in dispute; and since that is so the concern of the Commission over his taking the job without profit rather loses force. It may well be, as he said the fact was, that he would make his profit on other jobs that would work in with his contract. The municipality never questioned, and does not now question, that Sellitto had the necessary equipment for the work. The contract was of the sort generally referred to as a "scavenger contract". True, Sellitto had never had such a contract, or perhaps any contract with a municipality. But he had had experience over a number of years as scavenger in the Township of Hanover—not for the Township as his informal questionnaire mistakenly stated, but under private employment within the Township, as was certified to Cedar Grove Township by the Township Clerk of Hanover Township in these words: "I am well acquainted with Mr. Sellitto of Livingston and during my acquaintance with him have always found him to be most reliable. He has been serving as scavenger for the Township of Hanover for some time, and while providing this service for us we can compliment him highly upon his way of handling refuse."

It is not clear what technique there is in gathering ashes and garbage that required the added experience of working under a municipal contract. There was no distinct finding that Sellitto was not responsible.

Sellitto was the lowest bidder at the second advertised compe-

tition. As such he acquired a status which entitled him to a hearing before a valid contract might be awarded to another. Armitage v. City of Newark, 86 N.J.L. 5, 90 A. 1035. If the allegation is "that a bidder is not responsible, he has a right to be heard upon that question, and there must be a distinct finding against him, upon proper facts, to justify it." Faist v. City of Hoboken, 72 N.J.L. 361, 60 A. 1120, 1121; Kelly v. Board of Chosen Freeholders of Essex County, 90 N.J.L. 411, 101 A. 422. Prima facie he was entitled to receive the contract. Ianniello v. Town of Harrison, 4 N.J.Misc. 111, 132 A. 78. Mr. George Tierney was Mayor and one of the Board of Commissioners. It was his contention, as a witness in the case, that the matter of garbage collection was, by reason of the Walsh Act, N.J.S.A. 40:-70-1 et seg., under which the Township operated, within his department of Public Affairs; but that contention was left in weak position by reason of incompetent proof and by further reason of the assumption by the entire Commission of all control over the advertisement for bids, the opening of bids, the disposition of bids and the awarding of the contract. The contention was doubtless advanced in order to put the Mayor in capacity to hold a hearing on the award. What the Mayor did was to telephone Sellitto to come to his office. Sellitto came, bringing one Earrusso upon whose land Sellitto proposed to dump the refuse, and answered the Mayor's questions. Upon the proofs we find that Sellitto was not on notice that the interview was of the nature of a hearing upon his rights or indeed that the conference was anything else than the making of an investigation on behalf of the Commission within the purview of resolution mentioned above. An investigation fee for the information of the Commission is one thing; a hearing accorded a bidder as a matter of right may be quite another. At most, in our finding, that meeting was of the type of informal discussion pronounced inadequate in American Water Corporation v. Mayor, etc., Florham Park, 5 Misc. 969, 139 A. 169. No effort was made to check upon the information that had come from the Clerk of Hanover Township, and the reason given for the omission is that the communication came in under the first bid, not under the second; nevertheless the letter was in the Mayor's possession.

Our Court of Errors and Appeals, in speaking of the statutory expression "shall award . . . to the lowest responsible bidder" and of the duty of a municipal governing body with re-

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spect thereto, said: "We do not think that it is necessary to prove corruption or fraud on the part of the commission. The question for their determination was whether the appellant was so lacking in the experience, financial ability, machinery, and facilities necessary to perform the contract as to justify a belief upon the part of fair-minded and reasonable men that it would be unable to perform its contract." Paterson Contracting Co. v. City of Hackensack, 99 N.J.L. 260, 122 A. 741.

It appears to us that the Commission was satisfied with the work of Marangi and, having got his bid reduced, wanted him to have the award and gave it to him. That is an understandable attitude; but it loses sight of the fact that Marangi's lowered price was due to the competition. To quote further from Paterson Contracting Co. v. Hackensack, supra:

"To encourage contractors to submit bids for public improvements should be the aim of every community. Numerous bidders create competition. Competition lowers the costs. If bids are rejected arbitrarily or capriciously, contractors will not take the time and expend the money necessary to submit proposals. They will infer favoritism. This will result in fewer bidders and higher bids. The statute providing for the award of a contract for a public improvement to the lowest responsible bidder was enacted for the protection of bidders."

We conclude that Sellitto was not shown by competent evidence to be irresponsible, that he was not put on fair notice that a hearing was being accorded him and that the competent proofs do not show that a hearing was held; all of which may be summed up in saying that due regard was not had for Sellitto's status as the low bidder.

The award will be set aside, without costs.

Thereafter Sellitto was given a hearing and an award again made to Marangi on a finding that Marangi was the lowest responsible bidder. This action was set aside in Sellitto v. Cedar Grove Township, 133 N.J.L. 41, 42 A.2d 383 (1945), for want of any showing that Sellitto was "lacking in experience, financial ability, machinery or facilities necessary to perform the contract."

The contract must, of course, conform substantially to the published notice and to the specifications. Adams v. Town of Leesville, 210 La. 106, 26 So.2d 370 (1946).

Concerning the validity of a subsequent agreement to pay for extras or additional work not embraced in an original contract see collection of cases in Note 135 A.L.R. 1265 (1941).

SECTION 5. RATIFICATION, ESTOPPEL AND RESTITUTION

Where, for one reason or another, an express contract is so far illegal, defective, or irregular as to preclude enforcement the obvious question is—what other possible means of redress are open? It has already been encountered in this chapter, notably in the case of Donovan v. Kansas City, 352 Mo. 430, 175 S.W.2d 874 (1943). The possibilities include recovery on the theory of ratification, implied contract (implied in fact), estoppel and quasi-contract (implied in law—restitution) and more than one may be employed in the same case. Ratification and estoppel have the advantage to him who successfully asserts them of assuring him the benefit of his bargain and not merely the fair value of what has been done or furnished or the equivalent of the benefit conferred. See Scott County, Arkansas, v. Advance-Rumley-Thresher Co., 288 F. 739 (C.C.A. 8th, 1923).

Certain distinctions should be noticed at once. If the agreement is still executory, considerations which militate against insistence upon compliance with all legal requirements are at a Thus, ratification of unauthorized acts of subordinates or defective acts of the body or officer authorized to act in the first instance should be by that body or officer and in the form and manner required in the first instance. If, on the other hand, the agreement has been carried out by the opposite party, formal action is not generally made requisite to ratification. Other acts of competent authority from which an intent to ratify may fairly be inferred have been considered enough. Vermeule v. City of Corning, 186 App.Div. 206, 174 N.Y.S. 220 (1919), affirmed 230 N.Y. 585, 130 N.E. 903 (1920) (city council audited and made payments on bills for engineering services under a contract made by the city board of public works without authority). Acceptance and enjoyment of benefits capable of being surrendered have been deemed enough but this is a weaker case. Lowe & Campbell Athletic Goods Co. v. Tangipahoa Parish School Board, 207 La. 52, 20 So.2d 422 (1944).

This brings us to another important distinction. If the local unit lacked and still lacks substantive power to make the agreement there can be no ratification any more than there could have been a valid contract at the outset. Consider the effect of a statute, enacted in the interim, which grants the substantive power wanting in the first instance.

Express restrictions or limitations upon the power to contract and mandatory requirements as to procedure may be controlling factors. If the governing statute declares void any contract made without compliance with mandatory preliminaries, there patently can be no ratification. At best, the statutory requirements must be met in the process of ratification. See Ballagh Realty Co., Inc., v. Borough of Dumont, 111 N.J.L. 32, 166 A. 491 (1933). Will this ordinarily be possible with respect to an executed contract? Suppose the requirement violated called for a previous appropriation or a contract in writing? How could it be done in any case to meet a competitive bidding requirement, since, to follow the statutory pattern a fresh beginning as to advertising, and the rest, would have to be made?

ZOTTMAN v. THE CITY AND COUNTY OF SAN FRANCISCO

Supreme Court of California, 1862. 20 Cal. 96, 81 Am.Dec. 96.

FIELD, C. J., delivered the opinion of the court, COPE, J., concurring. In May, 1854, the city of San Francisco, then a municipal corporation, entered into a contract with Nutting and Zottman for the improvement of certain public grounds of the city, known as Portsmouth Square, in accordance with certain plans and specifications, the work to be performed by the contractors under the supervision of a superintendent to be selected by the common council of the city, and to be completed to the satisfaction of a special committee to be appointed by the common council, by the 12th of September, following. A portion of the work designated in the contract consisted in the construction of an iron fence around the square. The contract was made in pursuance of an ordinance of the city, and no question is raised as to its validity. After it was made, the special committee and the superintendent appointed by the common council, upon examination of the plans and specifications, came to the conclusion, that to render the work more durable than originally intended, there ought to be a stone base to the fence, instead of the one of wood named in the contract. They also discovered that no provision was made for painting the iron of the fence, without which, as stated by one of the witnesses, it would have immediately rusted from the damp weather of the season, and the fence have become of little value to the city, either for ornament or use. The superintendent and special committee, under these circumstances, in presence of the city attorney, the president of the board of aldermen, and of different members of the board, ordered the contractors to perform the extra work mentioned—that is, to construct a stone base in the place of one of wood, and to paint the iron of the fence—and assured them that the city would pay them therefor. In conformity with this order the extra work was performed, the contractors furnishing the necessary materials. And the testimony in the case shows that during its progress all the members of the common council must

have been aware of the order to the contractors, as the work was in full view from the windows of the council chambers, and was the subject of general conversation and approved by the members at their various sessions and elsewhere, and no opposition to it was ever expressed by any member. One of the witnesses produced by the plaintiff, states that the fence constructed was accepted by the city, and the amount of the original contract allowed; but the record immediately adds, that it was not shown that there was any action on the subject in either board of the common council. The statement is therefore to be regarded only as an inference of the witness from the separate approval of the individual members of the council, and not as establishing the fact of acceptance of the extra work by the corporation. If the original contract price was in truth allowed by the city, that circumstance by itself only shows a waiver of any objection to the work by reason of its deviation from the original specifications. It does not prove any acceptance or approval of the extra work as such. A separate bill for the extra work, including the materials furnished in its execution, was presented by the contractors to the special committee, but it does not appear from the record that the bill was ever presented to the common council, or was ever the subject of consideration by either board. It is for the amount of this bill that the present action is brought, Nutting having assigned his interest in the demand to his co-contractor, the plaintiff, and the liabilities of the city of San Francisco having been cast by the consolidation act upon the defendants. The court below gave judgment of nonsuit against the plaintiff, on the ground that there was no evidence of any ordinance of the common council of the city authorizing the extra work; and from this judgment the appeal is taken.

It is not pretended that the superintendent or special committee had any authority to enter into any contract on behalf of the city. Their powers were limited to the execution of the original contract, and did not embrace the making of a new or different one. But it is contended in substance: First, that as the employment of the contractors to perform the extra work, which included the furnishing of the necessary materials, was known to the individual members of the common council, and was approved by them, an adoption and ratification of the employment by the corporation are to be presumed; and second, that the corporation has received the benefit of the extra work of the contractors, and is in consequence liable to them upon an implied contract. The positions of the learned counsel of the appellant are not stated in this form, but his argument is to that purport. If the positions thus stated cannot be maintained, his case must fail.

An examination of the clauses of the charter of the city then in force, with reference to improvements and to contracts for work, will show the untenable character of the first position. The charter was the source of all the power which could be exercised on the subject. Looking to that instrument, we find that it vested in the common council the legislative power of the city, and clothed them with exclusive authority over improvements of the city property, and prescribed the mode in which the authority should be exercised. It empowered the council to pass "all proper and necessary laws," for such improvements (art. iii. § 13), and it required "every ordinance providing for any specific improvement" to be published after its passage by one board, and before its transmission to the other, with the ayes and noes, in some city paper (art. iii. § 4), and it declared that "all contracts for work" should be let to the lowest bidder, after notice given through the public journals. (Art. vi. § 7) These provisions, whilst conferring authority upon the common council, also fixed the bounds of their action. Beyond them they could not go and give validity to their acts. They could, therefore, only provide for any specific improvement of the city property by the passage of a law, that is, an ordinance for that purpose. "Laws" and "ordinances" when applied to the acts of municipal corporations are synonymous terms, and were so used in the charter. (Art. iii. § 3.) And to apprise the public of the improvement contemplated, and thus give an opportunity to suggest objections to the same, and to prevent improvident legislation on the subject, the clause was inserted in the charter requiring the publication of the ordinance for the improvement, after its passage by one board before its consideration by the other board. And even when the ordinance had become a law to prevent favoritism or fraud on the part of the common council or the officers of the city, the provision was added for giving the contract to the lowest bidder after due notice in the public journals. A contract made in disregard of these stringent but wise provisions cannot be the ground of any claim against the city. Individual members of the common council were not invested by the charter with any power to improve the city property, and any directions given or contracts made by them upon the subject, had the same and no greater validity than like directions given and like contracts made by any other residents of the city assuming to act for the corporation. And if individual members could not thus make any valid contract originally, they could not by any subsequent approval or conduct impart validity to such contract. But we go further than this; the common council even could not by any subsequent action give validity to a contract thus made. The mode in which alone they could bind the corporation by a contract for the improvement of city property was prescribed by the

charter, and no validity could be given by them to a contract made in any other manner. The rule is general and applies to the corporate authorities of all municipal bodies: where the mode in which their power on any given subject can be exercised is prescribed by their charter, the mode must be followed. The mode in such cases constitutes the measure of the power. Thus, where authority is conferred to sell property, with a clause that the sale shall be made at public auction, the mode prescribed is essential to the validity of the sale; indeed there is no power to sell in any other way. Aside from the mode designated there is a want of all power on the subject. This is too obvious to require argument, and so are all the adjudications. Thus in Head v. The Providence Insurance Company, 2 Cranch, 156, Mr. Chief Justice Marshall, in speaking of bodies which have only a legal existence. "The act of incorporation is to them an enabling act: it gives them all the power they possess: it enables them to contract, and when it prescribes to them a mode of contracting, they must observe the mode, or the instrument no more creates a contract than if the body had never been incorporated." (See Mc-Cracken v. The City of San Francisco, 16 Cal. 619: The Farmers' Loan and Trust Co. v. Carroll, 5 Barb, 649: The New York Fire Insurance Co. v. Elv. 5 Conn. 568: 13 Am.Dec. 100.)

As a necessary consequence flowing from these views, a contract not made in the prescribed mode, cannot be affirmed and ratified in disregard of that mode by any subsequent action of the corporate authorities, and a liability be thereby fastened upon the corporation. Ratification is equivalent to a previous authority; it operates upon the contract in the same manner as though the authority to make the contract had existed originally. The power to ratify, therefore, necessarily supposes the power to make the contract in the first instances; and a power to ratify in a given mode supposes the power to contract in the same way. Therefore, where the charter of a city authorizes a sale of city property only at public auction, a sale not thus made is from its very nature incapable of ratification, because it could not have been otherwise made originally. So where the charter authorizes a contract for work to be given only to the lowest bidder. after notice of the contemplated work in the public journals. a contract made in any other way—that is, given to any other person than such lowest bidder—cannot be subsequently affirmed. Were this not so, the corporate authorities would be able to do retroactively what they are prohibited from doing originally. We had occasion, in the case of McCracken v. The City of San Francisco, to give to this subject great consideration, and we there held, that where authority to do a particular act can only be exercised in a particular form or mode, the ratification must follow such form or mode, and that a ratification can only be made when the principal possesses at the time of the power to do the act ratified. The doctrines there laid down we regard of vital importance for the protection of the interests of municipal corporations, and without an adherence to them, restrictions such as were embodied in the charter of San Francisco—or at present are embodied in the consolidation act—upon the corporate authorities, may be practically disregarded and defeated. . . .

"It may sometimes seem a hardship upon a contractor that all compensation for work done, etc., should be denied him; but it should be remembered that he, no less than the officers of the corporation, when he deals in a matter expressly provided for in the charter, is bound to see to it that the charter is complied with. If he neglect this, or choose to take the hazard, he is a mere volunteer, and suffers only what he ought to have anticipated. If the statute forbids the contract which he has made, he knows it, or ought to know it, before he places his money or services at hazard.

The second position of the appellant, that the corporation has received the benefit of the extra work of the contractors, and is in consequence liable to them upon an implied contract, is as untenable as his first position. Indeed, the argument which meets the first position shows the unsoundness of the second. If the common council could not by any subsequent action affirm and ratify a contract originally made in disregard of the requirements of the charter, so as to fasten a liability upon the corporation, it is difficult to perceive how the benefit, which may have resulted to the city in the improvement of her property from the performance of the unauthorized and illegal contract, could create any such liability. We do not question the general doctrine, that where one receives the benefit of another's work he is bound to pay for the same, but we deny its application to the case like the present. The extra work for which the action is brought was performed without the request of the corporation: it could therefore of itself impose no obligation upon the corporation, any more than if the contractors had made any other improvements to the city property upon an unauthorized contract with individual members of the common council, or upon their own voluntary action independent of any such contract. The extra work having been thus performed without request, the common council had no authority after it was performed to agree to pay what it was reasonably worth. There is, indeed, no evidence in the record that the extra work was ever considered by either board; but we do not rest our opinion upon the want of evidence as to the action of the common council on the subject. but upon their want of power. They could not, as we have already shown, from the restrictions imposed by the charter upon their powers, have made a valid contract in advance to pay the contractors the reasonable value of the extra work—the charter requiring all contracts for the improvement of the city property to be given out to the lowest bidder, and of course at a fixed price, after notice of the contemplated improvement in the public journals. What they thus had no authority to agree in advance to pay for the work, they had no authority to agree to pay after the work was completed. As in the case cited from New York, the difficulty existed in their want of power to bind the corporation for improvements of the city property, except in the mode prescribed by the charter. Outside of the prescribed mode, as we have stated, they were destitute of any power over the subject. As they had no authority to agree to such payment in express terms, the law could not imply any such agreement against the corporation.

Judgment affirmed.2

The Zottman case has attracted a strong judicial following. It has been followed not alone where the statutory requirement was completely disregarded but also where there has been attempted but insufficient compliance.

FEDERAL PAVING CORPORATION v. CITY OF WAUWATOSA

Supreme Court of Wisconsin, 1939. 231 Wis. 655, 286 N.W. 546.

[A competitive bidding statute required that a notice to bidders be published in the official newspaper "not less than once a week for two successive weeks." The first notice as to a city paving project was published on June 24 and the second on July 1, 1937. The bids were opened, as advertised, on the evening of July 1, 1937 and an award made. In a taxpayer's suit, instituted after considerable work had been done by the contractor, to enjoin payment of any money to it on the contract, it was held that the statute contemplated a full two weeks' (fourteen days) publication of notice before the bid opening. It was accordingly determined that plaintiff therein was entitled to an injunction against payments upon the express contract. Bechtold v. City of Wauwatosa, 228 Wis. 544, 277 N.W. 657, 280 N.W. 320 (1938). In the present case the contractor sought restitution by recovery of

² The concurring opinion of Cope, J., is omitted.

the reasonable value of the paving to the city. The city appealed from an order overruling a general demurrer to the complaint.]

WICKHEM, JUSTICE. Defendant contends (1) that upon the previous appeal it was held that defendant was prohibited from contracting with plaintiff for the reason that it did not properly advertise for bids; and (2) that being prohibited from contracting except in a specified way, the plaintiff may not recover upon a theory of unjust enrichment.

It was the holding of this court upon the former appeal, from which the writer of this opinion dissented, that full satisfaction of the requirements of sec. 62.15, Stats., was a prerequisite to a valid contract, and that the city was prohibited from entering the contract without fully meeting the requirements of this section. After reviewing the authorities, the opinion states [228 Wis., 544, 280 N.W. 322]: "Upon the authority of these cases it is held that a municipality has no power to make contracts for public improvements unless it proceeds in the manner prescribed by law and that a contract entered into without complying with the charter provisions is void."

The following language from White Construction Co. v. Beloit, 178 Wis. 335, 190 N.W. 195, 196, was expressly approved: "The city may enter into a valid contract in the way specified by law and not otherwise. This is a limitation upon the right of a city to contract which the legislature has the right to create, and we are not disposed to construe it away."

With the holding upon the former appeal in mind, we direct our attention to the case of Shulse v. Mayville, 223 Wis. 624, 271 N.W. 643, 645, which fully reviews the authorities and sets for the es tablished doctrines applicable to recovery for unjust enrichment in cases involving void contracts. They may thus be summarized: (1) A municipality does not become liable by reason of any act of its officers or agents either for money, services or goods where it had no power originally to make itself liable by contract. This applies to situations in which the municipality had no contractual power whatever with reference to the subject matter of the purported contract. (2) A municipality does not become liable for money, goods or services upon principles of unjust enrichment where it is prohibited from contracting in any other than a specified way, as, for instance, with the lowest bidder. Where the statute specifies the manner in which the municipality may enter a contract the municipality does not become liable upon a contract entered in some other way unless the informal contract be ratified with the formality required by statute to make a contract. Since this category has to do with the municipality's liability upon contract it is of no materiality here. (4)

Where the municipality has power to do an act or enter into an obligation and is not prohibited from creating a liability in any but a specified way, it may become liable upon principles of unjust enrichment for moneys had and received, for services rendered, or for goods furnished. This is the converse of the situation set forth in (2), and relates to a situation where there is no prohibition against the creation of a contract in the way that it was sought to be created. (5) Where a municipality has received money, goods or services and accepted the benefits and it had power had it proceeded in the statutory way to acquire the money, goods and services and it has paid therefor, an action will not lie to recover back the money into the city treasury. (6) Where the statute provides that the contract can be made by a municipality only in the way specified, an action will lie to restrain payment upon a contract not in compliance with the statute even though there has been part performance and acceptance by the municipality. (7) Under some circumstances a municipality may become bound upon principles of equitable es-(8) Where the statute forbids the making of the contract by a municipality and the other party, the contract is illegal and there shall be no recovery upon principles of unjust enrichment.

The second proposition laid down by the Shulse case is plainly applicable here in view of the former holding by this court that the city of Wauwatosa was prohibited by statute from entering this contract "in any other than a specified way" and that the contract was void for failure to conform to mandatory requirements of the statute. This being true, the doctrine of the Shulse case, if adhered to, precludes any recovery on the basis of unjust enrichment. The importance of the matter and a quite natural disinclination to deny plaintiff a recovery for benefits conferred upon the municipality in good faith have led us to make an extensive restudy of the authorities bearing upon the matter. From this it appears that courts generally have encountered great difficulties in applying rules of restitution to municipal corporations. We do not propose to attempt an extended analysis or discussion of the entire subject. The two cases which furnish a beginning point for a consideration of the matter are Argenti v. San Francisco, 1860, 16 Cal. 255, and Zottman v. San Francisco, 1862, 20 Calif. 96, 81 Am.Dec. 96. Subsequent cases dealing with the subject will be found in 19 A.L.R. 408, 41 A.L.R. 790, 42 A.L.R. 632, 84 A.L.R. 936, and 110 A.L.R. 153. Adequate discussion of the principles involved are contained in the following articles and law reviews: 16 Virginia Law Review 628; 17 Minnesota Law Review 101: 47 Harvard Law Review 1143: 10 New York University Law Quarterly Review 64; 9 Michigan Law Review 671; and 39 West Virginia Law Quarterly 185.

The matter is thus put in sec. 62, Restatement of Restitution: "A person otherwise entitled to restitution of a benefit conferred by mistake is disentitled thereto if restitution would seriously impair the protection intended to be afforded by common law or by statute to persons in the position of the transferee or of the beneficiary, or to other persons."

One of the illustrations to this section is as follows: "In State X a statute provides that no contract for work to be done for a municipality where the contract price exceeds \$10,000 shall be made unless it has been passed upon at regular session of the municipal council duly called. A contracts with the city of Y for dredging for the price of \$50,000, the contract being approved only by the municipal officers. Upon completion of the work, A is not entitled to reasonable compensation from Y although he believed that the council had approved the contract or although he did not know of the statute."

It follows that the statements in Shulse v. Mayville, supra, which are decisive of this case, as well as holdings to the same effect in Journal Printing Co. v. Racine, 210 Wis. 222, 246 N.W. 425: Cawker v. Central Bitulithic Paving Co., 140 Wis. 25, 122 N.W. 888; and Chippewa Bridge Co. v. Durand, 122 Wis. 85, 99 N.W. 603, 106 Am.St.Rep. 931, are sustained by the great weight of authority and however harsh the result may appear to be, the decisions are sound in principle if there is to be effective enforcement of mandatory statutes and avoidance of the circumvention of statutory prohibitions. This principle also makes impossible application of the doctrine of estoppel as a means of binding a municipality. Where creation of a contract in any but a specified way is prohibited, the city may not by waiver, ratification, or acts ordinarily amounting to an estoppel give vitality to the prohibited contract or become bound upon principles of restitution. See Eau Claire Dells Improvement Co. v. Eau Claire, 172 Wis. 240, at page 257, 179 N.W. 2.

The conclusion is inevitable that an action based on principles of quasi-contract or restitution will not lie, and that the court should have sustained defendant's demurrer.

Order reversed, and cause remanded with direction to sustain the demurrer to the complaint and for further proceedings according to law.

See also Probst v. City of Menasha, 245 Wis. 90, 13 N.W.2d 504 (1944).

As the late Professor Tooke has shown, the doctrine of estoppel has been employed in many cases to relieve the rigor of the Zott-

man rule. C. W. Tooke, "Quasi-Contractual Liability of Municipal Corporations" 47 Harv.L.Rev. 1143 (1934). A case does not fit into conventional estoppel theory, however, unless there is some form of representation or conduct upon the inducement of which another justifiably changes his position. If recovery is to be allowed despite a deviation from statutory requirements restitution or quasi-contract would appear to provide a sounder basis than estoppel. The theory there is a clean-cut matter of doing justice with reference to the actual changes of position the parties have made.

The underlying problem is one of policy. Can the policy of a competitive bidding statute, for example, be preserved unimpaired if quasi-contractual relief can be had by one whose contract was awarded in violation of the statute? Professor Tooke thought so. In the paper, cited supra, at 1171, he wrote:

"At the time the first decisions precluding quasi-contractual recovery in these cases were handed down, taxpayers' actions to vindicate a public right were practically unknown, and no injunctive remedy was available to an individual unless his own special rights were or would be injuriously affected. The jurisdiction of courts of equity to grant injunctive relief in such cases, which has been extended either by judicial decision, or by statute, has created an effective machinery to protect the taxpayer. Where these equitable remedies have been supplemented by a proper administrative control over local finances, there would seem to be no reason why a municipal corporation should not be held to respond upon principles of quasi-contract for services rendered or materials furnished under invalid contracts intra vires the corporation. Such a judicial remedy to prevent injustice would be far superior to the common recourse to statutory validation, or to a delegation to the local legislative body of the discretionary power to pay "moral claims". [Footnotes omitted.]

While one may not share his optimism about the safeguards he mentioned, it yet may be said that the courts should make some accommodation of the legislative policy to primary considerations of justice and fair play.

Chapter 11

LOCAL GOVERNMENT RESPONSIBILITY IN TORT

SECTION 1. IN GENERAL—CASE LAW DEVELOPMENTS

It is the opinion of the writer that it would not be profitable to make extensive use of the case system in studying this topic. While the doctrinal material is far from symmetrical and consistent, intellectual content is not great. A textual presentation should suffice to afford a fair grasp of the doctrinal development. Beyond that it is desired to give an indication of significant legislative, judicial and administrative trends.

The legal periodical literature of local government, and particularly municipal, tort liability is immense. In addition to a wealth of general articles and comments one is likely to find law review analysis of the cases in a particular jurisdiction. Much of this material is referred to in the significant symposium on "Governmental Tort Liability," which was presented in the Spring 1942 Number of Law and Contemporary Problems. 9 Law and Contemp.Prob. 179. Important recent contributions include the symposium on "Government Liability in Tort," which appeared in the Summer 1948 Number of the Ohio State Law Journal and Leon Green's paper, "Municipal Liability for Torts" 38 Illinois Law Review 355 (1944).

Unfortunately, most of the writing, until recent years, has been along theoretical and doctrinal lines. A deal of factual research was needed to inform us about the character of tort claims against local government and about their administration. It was not enough simply to discuss the decisions of courts of last resort. however tempting the vagaries of the cases rendered the exercise. Thus it was that in the late 1930s the Committee on Public Administration of the Social Science Research Council, with the co-operation of the Municipal Law Section of the American Bar Association and other interested groups, sponsored studies of the administration of municipal tort liability in Boston, Chicago, Austin, Los Angeles, Washington, D. C., and Medford, Massachusetts. In addition a state-wide survey was made in Virginia by George A. Warp under the sponsorship of the Bureau of Public Administration at the University of Virginia, and, more recently. Mr. Oliver Schroeder, Jr., has made a study relative to the City of Cleveland and the Cleveland Transit System. The pioneer Los Angeles study, made by Leon T. David and John F. Feldmeier.

was published in 1939 by the Social Science Research Council under the title "The Administration of Public Tort Liability in Los Angeles 1934-38." Edgar Fuller's study "Tort Liability of Municipalities in Massachusetts" was published in 1941 by the Bureau of Research in Municipal Government of the Harvard Graduate School of Public Administration. The paper by Mr. Fuller and A. J. Casner, entitled "Municipal Tort Liability in Operation," which appeared in 54 Harvard Law Review at 437 in 1941, represented the fruits of the Boston research. In 1941 Mr. Warp published a monograph entitled "Municipal Tort Liability in Virginia" and, in 1942, an article in 28 Virginia Law Review at 360 under the title "The Law and Administration of Municipal Tort Liability." Mr. Schroeder's paper, "Administration of Municipal Tort Liability in Cleveland," appeared in a symposium on "Government Liability in Tort" in the Summer 1948 Number of the Ohio State Law Journal.

It is difficult to explain by what rational process, but somehow, the American courts have attributed the personal immunity of the Crown in England to the State in our system. It is understandable that a king would enjoy personal immunity from the jurisdiction of his courts but that did not mean that he could not commit legal wrongs. The maxim that the "King can do no wrong" is thought by competent scholars to have meant merely that he was not privileged to do wrong. E. M. Borchard, "Government Liability in Tort" 34 Yale L.J. 2n. (1924). Even if a despot were fully immune it is difficult to explain why a democratic state should be clothed with the same mantle of irresponsibility. Yet this is the notion which underlies state and local government immunity in tort in America—that of the state directly and of the local unit as a doer of state business.

Mr. Justice Holmes employed a much more matter-of-fact explanation of sovereign immunity. He said:

"A sovereign is exempt from suit, not because of any formal conception of obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

Kawananakoa v. Polyblank, 205 U.S. 349, 353, 27 S.Ct. 526, 527 (1907). This is overdoing realism. See the criticism by John M. Zane, "A Legal Heresy" 13 Ill.L.Rev. 431 (1919). Of course it will be said that a right without means of legal redress is a hollow shell. Let us turn for a moment from tort to contract and suppose that a state has issued bonds subject to no constitutional defect nor procedural irregularity. Are they strictly moral obligations or are they legal liabilities? Smith may not sue on them as owner but, another state which buys them outright from Smith

may certainly do so in the Supreme Court of the United States, a court of another sovereign. Suppose the bonds were acceptable in payment of taxes, would that make them more fully "legal" obligations? Thus, the obvious question arises—why may there not be a "legal right" ex delicto against the state that makes the law on which the right depends, even though it may not be sued in its own courts?

If state tort immunity were immunity from suit and not from liability there would appear to be not the slightest difficulty in holding local units in tort since they are customarily given capacity to sue and be sued without any reservations as to tort actions. Tort actions have been sustained against Federal public corporations under similar grants of capacity to sue and be sued. Keifer and Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 59 S.Ct. 516 (1938). If, on the other hand, the state were immune from tort liability, the question would yet remain whether local units should be judicially accorded the same immunity although the state had not ordained it by positive enactment. We know that local units do enjoy a more or less large measure of immunity but we must look into the history of the subject to find an explanation.

An important distinction has been made between municipal corporations and so-called "quasi-corporations," which, as we have seen, have been thought to include counties and townships as well as various types of ad hoc units. The English courts early took the position that quasi corporations were anomalous bodies, which, unlike regular corporations, were involuntary public agencies established to carry on functions of the state. In the celebrated case of Russell v. Men of Devon, 2 T.R. 667, 100 Eng.Rep. 359 (K.B.1788), an action on the case against the men dwelling in the county of Devon for damages to a vehicle caused by the failure of the county to repair a bridge, as required by law, failed on demurrer. The court relied upon the proposition that the county was only a quasi-corporation at best and pointed out that it had no funds for the satisfaction of a judgment. Nor did it look with favor upon the prospect of a multiplicity of actions for contribution among the inhabitants inter sese were they to be held individually liable.

The immunity precedent for "quasi-corporations" was set in this county in 1812 by the influential Massachusetts case of Mower v. The Inhabitants of Leicester, 9 Mass. 247. As others have observed, the Men of Devon case was poor authority for the Massachusetts decision since the latter had to do with an incorporated town which could levy taxes to provide funds to pay damages. James D. Barnett, "The Foundations of the Distinction Between Public and Private Functions in Respect to the Common-Law

Tort Liability of Municipal Corporations" 16 Or.L.Rev. 250, 264 (1937), citing Borchard, "Government Liability in Tort" 34 Yale L.J. 1, 41–45 (1924). We have had occasion, in Section 2 of Chapter 1, to consider the factors which have been relied upon to distinguish quasi-corporations from municipal corporations. They were not found to be at all compelling, particularly on the contemporary scene. For present purposes is there a basis in logic or justice for a distinction?

ANDERSON v. BOARD OF EDUCATION OF CITY OF FARGO

Supreme Court of North Dakota, 1922. 49 N.D. 181, 190 N.W. 807.

[Action by a widowed mother against the board of education for the wrongful death of her son. She alleged that her son, a pupil, while playing with other children on the school playground received a fatal blow on the head from a heavy, ironmounted, plank swing seat installed by the board. The complaint alleged lack of supervision and of physical safeguards to make out negligence on the part of the board.]

To the complaint the defendant interposed a demurrer. The ground of the demurrer was that the complaint did not state sufficient facts to constitute a cause of action. The trial court made an order sustaining the demurrer, from which defendant appeals. The theory of the demurrer, if we correctly understand its import, is that the schools of the city of Fargo are a part of the educational system of the state of North Dakota, and as such are a governmental agency of the state, and that, like the state, they are not subject to be sued for a wrongful tortious act occurring in connection with the exercise of their governmental functions. The schools of Fargo are organized and conducted under a special act of March 4, 1885, as amended by an act of February 2, 1915. All of the schools of Fargo are managed and directed by the board of This board has power to organize, establish, and maintain such and as many schools in the city as it may deem requisite and expedient and to change and discontinue any of the same.

Section 18 of the act defines the powers and duties of the board, which provides as follows:

Sec. 18. The said board of education shall have power, and it shall be their duty:

1. To organize, establish and maintain such and so many schools in said city as they may deem requisite and expedient, and to change and discontinue the same.

- 2. To purchase, sell, exchange and lease houses or rooms for school purposes, lots or sites for school houses, and to fence and improve them as they may deem proper.
- 3. Upon such lots or sites as are now owned or leased, or as may hereafter be purchased, owned or leased for school purposes, to build, enlarge, alter, improve, and repair schoolhouses, outhouses and appurtenances as they may deem advisable.
- 4. To provide, sell, exchange, improve and repair school apparatus, books for indigent pupils, furniture and appendages, and to provide fuel and other needful supplies for the schools. . . .

Subdivision 4 of section 18 of the act confers upon the board of education power to purchase all the needful supplies for the schools and all apparatus, furniture, and appendages. This power is broad enough to authorize the board to purchase all needful supplies for use in maintaining the health of the pupils and for their proper physical development. It may provide for apparatus to be used in manual training which develops the intellect and skill of the pupil, and as well contributes to his physical improvement. So likewise may apparatus be provided for track or football or basketball, and for smaller pupils, swings, teeter boards, and much other apparatus may be provided, all designed to improve the pupil in some respect. All such apparatus and much more not necessary here to mention the board is authorized to provide for use in the schools. All such apparatus is considered approximately as much a part of the needful supplies of schools as are the desks or other needful furniture. It constitutes a necessary part and portion of the school system. school would not be kept in needful supplies, unless such were a part of them. Hence, when the board of education provides them, it is acting in a purely governmental capacity. In reality it is a part of the principal duties of the board to provide such needful and necessary apparatus. If it be conceded that the board in furnishing and installing such apparatus and needful supplies in a school or on the school grounds is acting in a governmental capacity—and we think this must be conceded—it cannot be charged with the establishing and maintaining of a nuisance in that respect in the absence of a permissive statute to that effect, and there is no such statute in this state. Neither is it liable in an action of negligence if the act of negligence grew out of some act or acts of the board while acting in a governmental capacity. It is true, as appears from appellant's brief. that the New York Supreme Court, Appellate Division, under an act very similar to the special act here under consideration, arrived at a contrary conclusion in McCarton v. City of New York et al., 149 App.Div. 516, 133 N.Y.S. 941. It in substance

there held that, if the board of education maintained a flag pole which was unfit for the purpose, in that it was rotten and never should have been selected for such use, and which was in a position to endanger the life of those lawfully in the vicinity of the school building, with notice as alleged, that it was in an unsafe condition, it was liable upon the theory of having erected or of maintaining a nuisance, depending upon whether the original erection was unsafe, or the flagpole was maintained with actual knowledge that it was in a dangerous condition, or upon the theory of negligence, depending upon its failure to perform its statutory duty to provide for "prompt and efficient" repairs. In the same case the court in its opinion cited other New York authority in support of its decision.

However, in reaching our conclusion, we do not feel that we can follow the New York authority. To do so, we think, would result in placing a school corporation, having a board of education, and perhaps every school corporation, in such a position that actions for erecting or maintaining a nuisance or for negligence or for damages could be brought with as much ease against them as against the ordinary business corporation, and, if this would be the result, boards of education or school officers would have no immunity, and from fear and anticipation of such suits perhaps would fail to exercise the functions incumbent upon them in their governmental capacity, and this might very frequently result largely in failure of administration of school affairs. We think the safest rule is that, where such a board is acting in a governmental capacity in the discharge of its lawful duties, and its acts are such as are within its powers as defined by law, it should be immune from all forms of action against it, except such as are by law permitted.

Appellant has cited several decisions from the state of Washington in support of her position, among which may be mentioned Bruenn v. School District, 101 Wash. 374, 172 P. 569; Holt v. School District, 102 Wash. 442, 173 P. 335; Kelley v. School District, 102 Wash. 343, 173 P. 333; Howard v. Tacoma School District, 88 Wash. 167, 152 P. 1004, Ann.Cas.1917B, 792; Stovall v. Toppenish School District, 110 Wash. 97, 188 P. 12, 9 A.L.R. 908; Redfield v. School District, 48 Wash. 85, 92 P. 770. These cases do support the theory that a board of education may be sued for its negligence in the discharge of its functions and duties, but what we have said above with reference to New York cases is sufficient to dispose of these and other citations of like import by the appellant.

This brings us to the consideration of the claim of appellant that the schools of Fargo constitute a corporation, capable of suing and being sued, having a corporate seal and other attributes of the ordinary business corporation. We think its right to sue or be sued has reference to suits arising on contract or involving title of property or suits authorized by law.

It is not necessary to the decision of this case to distinguish between the rule of non-liability of a school corporation and that applied to municipal corporations proper, such as cities or incorporated villages, which are quite frequently liable for acts of malfeasance or neglect of duty on the part of its officers and agents, as, for instance, their negligence in not keeping streets or sidewalks in repair. We therefore refrain from entering upon any discussion in this respect.

Before concluding this opinion, it may be well to observe that the complaint, after setting out the allegations, with reference to negligence and the construction and the maintenance of a nuisance, which we have largely above set forth, also alleged the following:

"All of which was well known to defendant, its officers, agents, and servants, or in the exercise of ordinary diligence should have been known to it and them."

This is an attempt to plead knowledge on the part of the board of education. It states, however, no facts showing that the board had any such knowledge, and amounts to nothing more than a mere legal conclusion; but, if facts were stated which showed knowledge we still do not think the board of education would be liable if it acted in a governmental capacity in constructing the apparatus in question, and we have concluded it did; neither do we regard it as material in this case that the apparatus which caused the injury was not a part of the original plan of the school building, assuming that it was not a part thereof. The board, in providing the apparatus, as we have held, was acting within its governmental capacity and for that reason is protected from liability.

It is regrettable, indeed, that William Anderson lost his life in the circumstances mentioned, that his mother has sustained an irreparable loss, and that, while it is a maxim of law that for every wrong there is a remedy, that maxim does not seem to hold true in this and similar cases. While the plaintiff's loss is a real one and the damages suffered by her are no doubt substantial, the law affords her no remedy. The law, in effect, says to her: You alone must bear this burden; that, even if substantial damages might in some small measure assuage the great burden imposed upon you, through no fault of yours, nevertheless, in order to protect the public, you, widowed though you be, must bear the burden alone.

We hold that the demurrer is sufficient, and that the ground of the demurrer that the complaint did not state facts sufficient to constitute a cause of action is true. The order sustaining the demurrer is affirmed. The respondent is entitled to costs and disbursements on appeal.¹

HOUSING AUTHORITY OF BIRMINGHAM v. MORRIS

Supreme Court of Alabama, 1943. 244 Ala. 557, 14 So.2d 527.

Brown, Justice. Trespass on the case by the tenant against the landlord claiming damages for personal injuries received by the plaintiff on November 12, 1941, while using the commode installed in the bathroom of the apartment leased to the plaintiff and his wife by defendant, for family use, and while in the occupancy thereof.

The complaint, as it went to the jury, consists of three counts. Count A ascribes plaintiff's injury and damage to the negligence of the agents or servants of the defendant while acting within the scope of their employment in the maintenance of the water system supplying plaintiff's apartment with water, which defendant undertook and agreed to do, which, as the count avers, "Said pipes and water system were in the custody and under the control of the defendant and were retained by defendant in its own possession, custody and control at said time for supplying of water to plaintiff" and all other tenants of the defendant for the common benefit of said tenants in that respect, "in consequence of which plaintiff was badly scalded and burned."

Count B which adopts the inducement of Count A, with additional averments showing that there was attached to and a part of said water supply system in each of said units of said apartment house, a gas heater designed to supply hot water for family use, ascribes the plaintiff's injury to the negligence of defendant's servants in negligently maintaining said water-heaters, as a proximate consequence of which plaintiff was scalded and burned.

Count C ascribes plaintiff's injuries and damage to the negligence of the defendant's agents or servants in maintaining the hot water tank in plaintiff's apartment as a part of the water system designed by the defendant in supplying water to said apartment for family use.

After demurrer overruled to the complaint, the defendant pleaded to each of said counts, as the general issue, "The al-

¹ The concurring opinions of Christianson and Bronson, J.J., are omitted.

legations of said counts are untrue." This plea seems to have treated by the parties and the trial court as a plea of "Not guilty." See Code 1940, T. 7, § 225. The defendant pleaded specially, pleas 3, 4, 5 and 6—contributory negligence—and special plea 2 setting up an exculpating stipulation in the lease, purporting to exculpate and save the landlord from liability for damages to the person or property of the tenant, his visitors or licensees from any cause whatsoever. . . .

Each of said counts aver in substance and legal effect that the defendant engaged to supply plaintiff's apartment with water and retained possession and control of the water system in said apartment house to that end, and its servants, agents or employees while acting within the scope of their employment negligently caused hot-water to be propelled through the cold water pipes into the commode in plaintiff's apartment, and as a proximate consequence plaintiff received his said injuries—and was not subject to the grounds stated in the demurrer. Prudential Ins. Company of America v. Zeidler et al., 233 Ala. 328, 171 So. 634; Wardman v. Hanlon, 52 App.D.C. 14, 280 F. 988, 26 A.L.R. 1249.

The defendant's plea 2 is in the following language: "2. Defendant avers that plaintiff was occupying said apartment under a written lease. Defendant further avers that in said lease it was expressly provided as follows: "Neither the landlord nor any of its representatives or employes shall be liable for any damage to person or property of the tenant, or any member of tenant's family, or any of the tenant's visitors or licensees for loss from theft, or from any cause whatsoever." The averments of the plea do not disclose the background of the clause, except as it may be gathered from the averments of the complaint, showing a continuing active duty on the defendant to maintain and keep in repair the elements constituting the water system in said apartment.

The demurrer challenges the sufficiency of the plea on the ground that the defendant cannot exculpate itself from liability for it own negligence by stipulation in the lease, and this is appellee's contention.

The appellant, on the other hand, contends that such stipulation is valid and within the contracting powers of the defendant.

These contentions present the controlling questions in this case, which are not without difficulty, and bring forward the nature, purpose, powers and authorities of the defendant corporation, and the legislation which brought it into being.

The defendant was incorporated, as its name and activities clearly indicate, under the "Housing Authority Law" approved

February 8, 1935, Acts 1935, pp. 126, 143, carried forward in the Code of 1940, with amendments, as Tit. 25, Chapter 2, §§ 5 to 30, inclusive.

The background for the enactment of the law is stated in Chapter 2 of the Act of 1935, p. 126, Code 1940, T. 25, § 5 to wit: "Finding and declaration of necessity.—It is hereby declared that unsanitary or unsafe dwelling and public school accommodations exist in various cities of the state and that such unsafe or unsanitary conditions arise from overcrowding and concentration of population, the obsolete and poor condition of the buildings, improper planning, excessive land coverage, lack of proper light, air and space, unsanitary design and arrangement, lack of proper facilities, and the existence of conditions which endanger life or property by fire and other causes; that in all such cities persons of low income are forced to reside in unsanitary or unsafe dwelling accommodations; that in various cities of the state there is a lack of safe or sanitary dwelling and public school accommodations available to all the inhabitants thereof and that consequently persons of low income are forced to occupy overcrowded and congested dwelling accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the citizens of the state and impair economic values; that the aforesaid conditions also exist in certain areas surrounding such cities: that these conditions cannot be remedied by the ordinary operations or private enterprises; that the clearance, replanning and reconstruction of the areas in which unsanitary or unsafe housing conditions exist and the providing of safe. sanitary and uncongested dwelling accommodations at such rentals that persons who now live in unsafe or unsanitary or congested dwelling accommodations can afford to live in safe, sanitary and uncongested dwelling accommodations, are public uses and purposes for which public money may be spent and private property acquired; that it is in the public interest that work on such projects be instituted as soon as possible in order to relieve unemployment which now constitutes an emergency; and the necessity in the public interest for the provision hereinafter enacted, is hereby declared as a matter of legislative determination." (Italics supplied.)

In the definition of terms is the following: "Section 3. . . . (1) 'Authority' or 'housing authority' shall mean a public body organized as a body corporate and politic in accordance with the provisions of this Act for the purposes, with the powers and subject to the restrictions hereinafter set forth.

"'Housing Project' shall include all real and personal property, buildings, and improvements, stores, offices, public school buildings, lands for farming and gardening, and community facilities acquired or constructed or to be acquired or constructed pursuant to a single plan of undertaking (a) to demolish, clear, remove, alter or repair unsanitary or unsafe housing and/or (b) to provide dwelling accommodations [accommodations] at rentals within the means of persons of low income. The term 'housing projects' may also be applied to the planning of the buildings and improvements, the acquisition of property, the demolition of existing structures, the construction, reconstruction, alteration and repair of the improvements and all other work in connection therewith." Acts 1935, p. 127, Code 1940, Tit. 25 § 6.

Section 6 of the act provides: "duty of the authority and commissioners of the authority. The authority and its commissioners shall be under a statutory duty to comply or to cause compliance strictly with all provisions of this Act and the laws of the State of Alabama and in addition thereto, with each and every term, provision and covenant in any contract of the authority on its part to be kept or performed." Acts 1935, p. 131 § 6, Code 1940, Tit. 25, § 9.

The commissioners constituting the governing board are subject to removal by the mayor of the city or town. Acts 1935, p. 131, § 8, Code 1940, Tit. 25 § 11.

The act grants to the "Authority" broad powers, among which are: "Section 9. Powers of authority. An authority shall constitute a public body and a body corporate and politic exercising public powers, and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this Act, including the following powers in addition to others herein granted; To investigate into living, dwelling and housing conditions and into the means and methods of improving such conditions; to determine where unsafe, or unsanitary dwelling, public school or housing conditions exist; to study and make recommendations concerning the plan of any city located within its boundaries in relation to the problem of clearing, replanning and reconstruction of areas in which unsafe, or unsanitary dwelling, public school, or housing conditions exist, and the providing of dwelling accomodation [accommodations] for persons of low income, and to cooperate with any city or regional planning agency; to prepare, carry out and operate housing projects; to provide for the construction, reconstruction, improvement. alteration or repair of any housing project or any part thereof; . . . to sue and be sued; to have a seal and to alter the same at pleasure; to have perpetual succession." Acts 1935, p. 132, § 9 Code 1940, Tit. 25, § 12. (Italics supplied).

The authority is by §§ 12 and 13 endowed with the element of sovereignty, the power of Eminent Domain, to take private or

government property for its uses and purposes. Acts 1935, p. 135, §§ 12 and 13, Code 1940, Tit. 25, §§ 15, 16.

There is nothing in the act that expressly exempts the "authority" from liability proximately resulting from its negligence or the negligence of its agents or servants, in conducting the business for which it was given life, or that authorizes it to provide by contract for such immunity. The express authority in the act of its creation subjecting it to be sued generally indicates a legislative intent to the contrary.

Corporations created for public purpose must of necessity function through human agency, and it is a well recognized general principle, founded on human experience, that "agreements exempting persons from liability for negligence induces a want of care, for the highest incentives to the exercise of due care rest in consciousness that a failure in this respect will fix liability to make full compensation for any injury resulting from the cause. It has therefore been declared to be a good doctrine that no person may contract against his own negligence. . . ." 12 Am. Juris. p. 683, § 183; Southern Express Co. v. Owens, 146 Ala. 412, 41 So. 752, 8 L.R.A.,N.S., 369, 119 Am.St.Rep. 41, 9 Ann.Cas. 1143.

This general principle is expressly applicable to persons and corporations engaged in public service in respect to the public service for which they are created, or for which they have been granted the element of sovereignty—the power of eminent domain. In respect to such matters public policy forbids that they contract for immunity for their negligence or the negligence of their servants or agents committed in the prosecution of their major business. Southern Express Co. v. Owens, 146 Ala. 412, 41 So. 752, 8 L.R.A.,N.S., 369, 119 Am.St.Rep. 41, 9 Ann.Cas. 1142; Southern Railway Company v. Jones, 132 Ala. 437, 31 So. 501; American District Tel. Co. of Alabama v. Roberts & Son, Inc., 219 Ala. 595, 122 So. 837. . . .

The plaintiff's demurrer to the defendant's plea 2 was therefore, sustained without error. . . .

On Rehearing.

Brown, Justice. There is nothing in Opinions of the Justices, 235 Ala. 485, 179 So. 535, or the opinion of the Court in Brammer v. Housing Authority of Birmingham District, 239 Ala. 280, 195 So. 256, that militates against the holding in the foregoing opinion that the housing authority is a corporate entity, created for purposes, among others, of providing safe dwelling quarters for persons of low income, and that it cannot contract against its liability for negligence. There is certainly nothing in those

opinions or in the opinions of courts of other states, cited in the application for rehearing, that would justify a holding that said housing authority may create and maintain a trap to inflict personal injury upon its tenants. The suggestion that said corporation is a governmental agency is no answer to its liability. The books are full of decisions holding that such governmental agencies may be sued where the statutes under which they exist so authorize. An apt illustration is the Director General of Railroads created and existing during World War I. The sheriff is an officer of the state, created and existing under its police power. Nevertheless the sheriff can be sued for his torts because the statutes so authorize suits against him. Even a policeman may be sued for his torts and the mere fact that he is a police officer is not an answer to his liability. . . .

The application for rehearing is without merit and is due to be overruled. It is so ordered by the Court.

See also Muses v. Housing Authority of City and County of San Francisco, 189 P.2d 305 (Cal.App.1948); Manney v. Housing Authority of City of Richmond, 79 Cal.App.2d 453, 180 P.2d 69 (1947).

What of municipal corporations? "The doctrine of the early English common law that (with exceptions) denied the liability of corporations in general by reason of technical difficulty in securing evidence of corporate action and bringing corporations into court, or logical difficulty in ascribing *illegal* action to 'fictitious entities' created wholly by law, or tardy development of the law of agency, has found practically no acceptance in this country." Barnett, op. cit. supra, 250–251. See also McCombs v. Akron, 15 Ohio 474, 480 (1846).

As Professor Barnett has pointed out, this early lack of flexibility in dealing with the corporate concept had little effect on American law and long since was repudiated in England. What is most significant here is that in the early American cases corporations were subjected to tort liability without any distinction between public and private corporations being made. Some of these cases probably antedated the emergence of the classification of corporations into public and private bodies. It took shape in the forepart of the nineteenth century along with the conception of legislative supremacy over public corporations. In Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 4 L.Ed. 629 (1819), the English contract theory of corporate charters was applied to a private corporation but denied, obiter, as to those of

² Footnote omitted.

a public character. The Supreme Court employed the public corporation classification in 1830 to support a decision denying recovery in tort against a municipality, but it was not a strong case. The plaintiff was suing for the loss of goods due to the insolvency of an auctioneer who had been licensed by the municipality but not required to post bond. As the Court saw it the municipality had no power to license or require bond. Fowle v. Common Council of Alexandria, 3 Pet. 398, 7 L.Ed. 719 (1830).

The important turn in state-court jurisprudence came in 1842. Down to that time it was the prevailing doctrine that municipalities were on a footing with private corporations with respect to tort liability. The Supreme Court of New York decided in that year the landmark case of Bailey v. The Mayor etc., of the City of New York, 3 Hill 531. The action was for damages to property due to negligence in the construction of a water-supply dam on the Croton River. The city insisted that respondeat superior did not apply because it was acting solely for the state in carrying on the project. In granting the plaintiff a new trial the court took a contrary view. It concluded that for purposes of the enabling statutes the city was in the position of a private corporation and by going ahead voluntarily had accepted the agency of the commissioners. At the same time the opinion practically conceded that were the city to be deemed to have been acting in its public character it would not have been liable. Chief Justice Nelson developed the distinction as follows:

"The powers conferred by the several acts of the legislature authorizing the execution of this great work are not, strictly and legally speaking, conferred for the benefit of the public. The grant is a special, private franchise, made as well for the private emolument and advantage of the city, as for the public good. The state, in its sovereign character, has no interest in it. It owns no part of the work. The whole investment under the law and the revenue and profits to be derived therefrom, are a part of the private property of the city; as much so as the lands and houses belonging to it, situate within its corporate limits.

"The argument of the defendants' counsel confounds the powers in question with those belonging to the defendants in their character as a municipal or public body—such as are granted exclusively for public purposes to counties, cities, towns and villages, where the corporations have, if I may so speak, no private estate or interest in the grant. As the powers in question have been conferred upon one of these public corporations, thus blending in a measure those conferred for private advantage and emolument with those already possessed for public purposes, there is some difficulty, I admit, in separating them in the mind, and properly distinguishing the one class from the other, so as to distribute the responsibility attaching to the exercise of each. But the dis-

tinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, quoad hoc, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchise had been conferred." 3 Hill 539.

Thus was born the generally (but not universally) accepted American doctrine that a municipality is not liable for wrongs committed by its agents in the conduct of public, political or governmental functions but is liable for those done in the performance of private, ministerial, corporate or proprietary functions. There has been so much confusion and inconsistency in the judicial attempts to apply this largely artificial distinction that it is little wonder the law reviews have had a field day with the cases.

Professor Borchard has ably summarized most of the judicial refinements in theory which have been developed in an effort to classify municipal functions.

"In the effort to distinguish governmental from corporate functions of municipal corporations, the courts have drawn in aid various criteria or justifications which seemed to them controlling or persuasive. Thus, aside from the argument derived from the sovereign immunity of the city as agent of the state, the immunity has been placed on the ground that the city derives no pecuniary benefit from the exercise of public functions; that in the performance of public governmental duties the officers are agents of the state and not of the city, and that therefore the doctrine of respondeat superior does not apply; that cities cannot properly perform their functions if they are made liable for the torts of their employees; that the city should not be liable for negligence in the performance of duties imposed upon it by the legislature, but only in the case of those voluntarily assumed under general powers; that in determining whether or not to undertake an act the function is governmental, but the execution of the decision in practice is corporate or ministerial; that powers exercised for the benefit of the public at large are governmental, but those conferred for its own benefit and by reason of its nature as a municipal corporation are corporate."3

³ Footnotes omitted.

E. M. Borchard, "Government Liability in Tort" 34 Yale L.J. 127, 132–133 (1924). He concluded that not one of them was sound. They may be worked both ways. In one state the circumstance that the local unit was acting in the performance of duties imposed upon it by the legislature in maintaining public ways has been used to ground immunity. Evans v. City of Sheboygan, 153 Wis. 287, 141 N.W. 265 (1913). In others the legislative mandate as to maintaining streets is made the basis of liability. In Ohio grounding civil liability upon public duty is readily achieved under a statute which requires municipalities to keep streets in repair and "free from nuisance". Ohio Gen. Code § 3714 (Page, 1938). See Village of Cardington v. Adm'r of Fredericks, 46 Ohio St. 442, 21 N.E. 766 (1889); Taylor v. City of Cincinnati, 143 Ohio St. 426, 55 N.E.2d 724 (1944).

With respect to the classification of local functions for tort liability purposes it can safely be said that police and fire protection, education, and some aspects of health protection are usually labelled governmental without much difficulty. An Oklahoma decision that a municipal hospital belongs in the proprietary category is exceptional. City of Okmulgee v. Carlton, 180 Okl. 605, 71 P.2d 722 (1937). At the other extreme, wharves and markets as well as conventional public utility services, such as water, gas, electricity and transit, are readily classified as proprietary although water systems usually have health and fire protection implications, which have given the courts some trouble. In between are numerous functions as to which the decisions are badly divided.

The governmental-proprietary distinction is not significant in patent infringement cases and, as a general rule, in instances of invasions of private property. Patent infringement is a tort and a local unit stands on the same footing as any other infringer, unless exempted by federal statute. An injunction may be denied as to present infringement, however, where the public health would be jeopardized as by closing a sewage plant. City of Milwaukee v. Activated Sludge, Inc., 69 F.2d 577 (C.C.A.7th, 1934); Harry Sommers, "Municipal Liability for Patent Infringement" 24 Am.Bar Ass'n J. 162 (1938).

When we consider the common law background it is the more understandable that local units have been held liable in trespass for positive misconduct in invading private property, at the same time that there has been a wide area of escape from civil responsibility for nonfeasance. A concrete intrusion upon private property fitted into the common law pattern of forms of action. Inaction, however, was not "trespass" and the historic way of dealing with official failure to act was by presentment. Borchard, "Government Liability in Tort" 34 Yale L.J. 129, 136–139 (1924).

Nuisance, as well as trespass, has been an effective basis of recovery against local government for damage to property. municipality which so uses its public property as to subject private holdings to a nuisance is held accountable for property damage much as any other landowner, although recovery for personal injury is exceptional. Hines v. City of Rocky Mount, 162 N.C. 409, 78 S.E. 510 (1913) (recovery for property damage only; two judges dissented from denial of damages for personal injury). In the Hines case stress was laid upon the constitutional safeguard against the taking of private property for public purposes without making just compensation. In some states the constitution refers to damaging as well as "taking". Prior compensation may be required as to "taking" alone or as to both; Louisiana requires prior compensation with respect to damaging as well as taking. La.Const. of 1921, Art. 1, § 2. While a provision of the Louisiana type lays the broadest basis for recovery in tort against a local unit which is taking or damaging private property without resorting to condemnation, differences in the scope of constitutional provisions do not appear to have produced diversity of decision in the tort cases.

For many years the tendency has been to constrict the area of immunity. There have, of course, been judicial and statutory cross-currents. In 1911 the South Carolina court rejected the governmental-proprietary test only to establish broad immunity. Irvine v. Town of Greenwood, 89 S.C. 511, 72 S.E. 228. And see the early case of White v. Charleston, 2 Hill 571 (S.C.1835). Several states have statutes expressly granting immunity as to municipal airports. The Tennessee act has been upheld. Stocker v. City of Nashville, 174 Tenn 483, 126 S.W.2d 339 (1939). The Texas act has been invalidated as a denial of equal protection and due process. Christopher v. City of El Paso, 98 S.W.2d 394 (Tex.Civ.App.1936). Statutory affirmations of school district immunity are not uncommon, especially with reference to school safety patrols. For references to legislation see Harry N. Rosenfield, "Governmental Immunity from Liability for Tort in School Accidents' 5 Leg. Notes on Local Govt. 358, 365 (1940). The trend, to repeat, has, however, been the other way. The Ohio court overthrew the governmental-proprietary test in 1919, only to reinstate it three years later. Fowler v. City of Cleveland. 100 Ohio St. 158, 126 N.E. 72 (1919); Aldrich v. City of Youngstown, 106 Ohio St. 342, 140 N.E. 164 (1922). Make-weights, such as the profit factor in the operation of recreational facilities. or the theory that the activity is ministerial have been used to enable the court to apply the "proprietary" label. Matthews v. City of Detroit, 291 Mich. 161, 289 N.W. 115 (1939); Hoggard v. City of Richmond, 172 Va. 145, 200 S.E. 610 (1939). In Pennsylvania

recovery was had against a county, even though its business was assumed to be purely governmental, where it was not practicable to separate them from proprietary activities of another unit with which the county was acting jointly. Pittsburgh and Allegheny County jointly owned and operated an office building. for proprietary activities of the city were located in the building and some space was let for private use. County employees operated one elevator and city personnel another but both were used indiscriminately. A city public welfare department visitor was injured in the county-operated elevator due to the negligence of the operator. She recovered judgment against the city and county jointly. The court would not attempt to unscramble the mixed relations the two units had assumed. Bell v. City of Pittsburgh, 297 Pa. 185, 146 A. 567 (1929). Cf. Hartness v. Allegheny County, 349 Pa. 248, 37 A.2d 18 (1944). While the weight of the cases is to the contrary, there is considerable authority for treating street cleaning and sprinkling and garbage and trash removal as private functions. See collections of cases in Notes 156 A.L.R. 692, 714 (1945).

In Louisiana the factor of insurance has made practical inroads upon the immunity rule. If the immunity goes to the substance, as the Supreme Court of Louisiana has held in West Monroe Mfg. Co. v. Town of West Monroe, 146 La. 641, 83 So. 881 (1920), it is not clear that insurance would be a lawful object of expenditure, yet Louisiana local units have carried liability insurance covering activities clearly governmental in character. See Harry N. Rosenfield "Governmental Immunity from Liability for Tort in School Accidents", 5 Leg. Notes on Loc. Govt. 358, 369 (1940). By statute in that state an insurance company may be sued on a liability policy without joining the assured. It has been decided that the insurer may not rely on governmental immunity. For rationalization it is said, among other things, that the immunity is a matter of defense personal to the insured local unit. Perrodin v. Thibodeaux, 191 So. 148 (La.App.1939); Rome v. London & Lancashire Indemnity Co. of America, 156 So. 64 (La.App.1934), affirmed 181 La. 630, 160 So. 121 (1935). This affords redress but the rationale is very thin. It runs counter to the theory of the Town of West Monroe case, supra, that it is essential to the plaintiff's cause of action that the injury arose out of proprietary activities. See J. B. Fordham and W. T. Pegues, "Local Government Responsibility in Tort in Louisiana" 3 La.L.Rev. 720, 749-750 (1941).

Even where the function is unquestionably proprietary the local unit may escape responsibility by showing that in the performance of the function it was acting ultra vires. The usual statement of the rule is that ultra vires is a good defense if the

unit was acting wholly outside its lawful powers but not where the activity was authorized even though the particular act was an irregular or improper manner of exercising a granted power. The plea has been sustained in a case in which a municipality had run an electric distribution line outside its limits without authority. Hyre v. Brown, 102 W.Va. 505, 135 S.E. 656 (1926). So it was in the case of the unauthorized operation of a municipal hospital for profit. City of Dallas v. Smith, 130 Tex. 225, 107 S.W.2d 872 (1937).

On the other hand, the North Carolina court, by use of the same formula, has been able to reject a plea of ultra vires, four-to-three, in a case where a municipality with general authority to maintain bridges over streams within its limits maintained a footbridge not on a city street but over private property. Whitacre v. City of Charlotte, 216 N.C. 687, 6 S.E.2d 558 (1940). In defense of the ultra vires rule see Gettys, "Municipal Liability for Ultra Vires Tortious Acts" 8 Temp.L.Quar. 133 (1934).

It may be questioned whether even a narrow application of ultra vires is sound in the tort cases. The injured party's relation with the local unit is not consensual. Yet the more unlawful the act of the unit the less likely he is to recover. Legal responsibility, it may be urged, should be geared more to capacity to do harm than to the legal scope of corporate powers.

In a number of cases the ultra vires formula has been carried to the extreme limit; it has been asserted that a local unit is not authorized to commit a tort, which is another way of saying that any tort would be ultra vires. City of Chicago v. Williams, 182 Ill. 135, 55 N.E. 123 (1899); Board of Education of Cincinnati v. Volk, 72 Ohio St. 469, 74 N.E. 646 (1905). This plainly begs the whole question.

SECTION 2. PUBLIC WAYS

The most important breakdown in the governmental-proprietary formula has occurred in the street, road, sidewalk and bridge cases. The construction, maintenance and repair of public ways is as plainly governmental as anything on the long list of local functions. In most of the states municipalities are liable for negligence in the form of failure to keep public ways in safe condition. This is achieved in a number of states by express statutory provision, but in others by decision. Professor Borchard has stated that, in the absence of statute, the commonly advanced ground has been that the duty to keep public ways in

proper condition is ministerial. Borchard, "Government Liability in Tort" 34 Yale L.J. 229 (1924). The New York Court of Appeals early developed the theory that there was an implied undertaking by a municipality to keep public ways in repair made in consideration of the grant to it of corporate powers and capacity. Weet v. Trustees of the Village of Brockport, 16 N.Y. 161 (1856). This borrowing of English contract theory as to corporate charters was highly vulnerable since there is no reciprocity of stipulation between a parent state and a local unit. Note the broader theory previously employed by that court in City of New York v. Furze, 3 Hill 612 (1842). In Louisiana, where the bulk of tort cases is decided under Articles 2315-2317 of the Civil Code, which have been found broad enough to embrace a great body of common law tort doctrine, it has been frankly stated that the street and sidewalk cases constitute an exception to the rule of immunity. Clinton v. City of West Monroe, 187 So. 561, 564 (La.App.1939).

Liability in these cases is usually based upon fault. An exceptional situation exists in West Virginia where the governing statute goes so far as to provide for liability without fault. See Rich v. Rosenshine, 45 S.E.2d 499 (W.Va.1947) and T. Brooke Price, "Governmental Liability for Tort in West Virginia" 38 W.Va.L.Q. 101 (1932). In some cases not based upon such a statute a distinction is made between absolute nuisance for which there is liability without fault because of the unlawfulness from the outset of the defendant's conduct or of the unusual hazards involved and nuisance in fact where liability is said to depend upon negligence. Taylor v. City of Cincinnati, 143 Ohio St. 426, 55 N.E.2d 724 (1944). A municipality which is responsible for an unlawful obstruction in a public way is guilty of a purpresture and may be liable on an absolute nuisance theory to one injured by the obstruction.

Some activities and conditions classified as nuisances involve the element of intentional harm to others but the negligence situation is more common. Apart from intentional harms, is the distinction between nuisance per se, based on the degree of danger, and nuisance in fact, based on the degree of care used, valid? It is safe to say that in most cases the duty owed by the municipality is to exercise reasonable care to keep streets and sidewalks in a reasonably safe condition, although there is much talk of both nuisance and negligence. Contributory negligence is a good defense. Beach v. City of Des Moines, 26 N.W.2d 81 (Iowa 1947); Klassette v. Liggett Drug Co., 227 N.C. 353, 42 S.E.2d 411 (1947). Breach of duty is not made out unless the unsafe condition were known or should have been known by responsible officials. City of Birmingham v. Martin, 228 Ala. 318.

153 So. 235 (1934); Watson v. City of Alameda, 219 Cal. 331, 26 P.2d 286 (1933); City of Denver v. Willson, 81 Colo. 134, 254 P. 153 (1927); Matchulot v. City of Ansonia, 116 Conn. 55, 163 A. 595 (1932); Thien v. Belleville, 331 Ill.App. 337, 73 N.E.2d 452 (1947); City of Covington v. DeMolay, 248 Ky. 814, 60 S.W.2d 123 (1933); Cook v. City of Boston, 266 Mass. 159, 164 N.E. 917 (1929); City of Knoxville v. Hargis, 184 Tenn. 262, 198 S.W.2d 555 (1947).

VICKERS v. CITY OF CAMDEN

Court of Errors and Appeals of New Jersey, 1939. 122 N.J.L. 14, 3 A.2d 613.

PORTER, JUSTICE. These two cases are here on appeal from the Supreme Court, Camden Circuit, where they were tried together for convenience, both arising out of the same occurrence.

The actions were to recover damages from the City of Camden, arising out of an automobile collision in which two young men were seriously injured and burned. One of them, Davis L. Love, died within a few days as a result of his hurts and his administrator ad prosequendum and general administrator of his estate is the plaintiff in the one suit and Garland P. Vickers, who was seriously and permanently injured, is the plaintiff in the other suit. Both these men were riding in an automobile truck which was in collision with another automobile at the intersection of N. J. State Highway Route 25, on which their automobile was traveling, and Federal Street, on which the other automobile was traveling.

This intersection is partly in the City of Camden and partly in the Township of Pennsauken, the dividing line between the two municipalities running through the center of Federal Street.

Automatic traffic signal lights were maintained at this intersection on each of the four corners at the joint expense of the two municipalities. At the time of the collision they were out of order and the lights showed green for both highways at the same time so that the indication was a right of way for both drivers. Both continued on their courses and the collision resulted. By arrangement between the municipalities, for convenience, Camden undertook the care and control of the signals. The lights had not been operating properly for several days before the accident and notice of that fact had been given to Camden.

At the close of the plaintiffs' case a motion for a nonsuit was granted by Judge Palmer, the trial judge.

The propriety of that ruling is the sole ground of appeal.

Municipalities are not responsible for negligence except it be the result of active wrongdoing or when in the performance of other than governmental functions. The question presented for determination is whether the neglect or omission to have these lights repaired, so that they worked properly, was an act of active wrongdoing.

We conclude that it was not, but was rather an act of negligence. There is no testimony that the lights were improperly constructed. On the contrary, they had been operating properly for a number of years. They simply became out of order and the negligence or wrongful act was the failure to have them repaired. For this there can be no recovery, it not being active wrongdoing.

Moreover, it is a governmental function to regulate traffic on our highways and to erect signal lights for that purpose. The statute specifically permits municipalities to construct and operate traffic lights for the safety and convenience of the public. P.L.1928, chapter 191, page 362, R.S.1937, 40:67-16. We think that in principle the location of the lights in two municipalities and joint operation or direction of control by but one for both makes no difference concerning liability. Operation of lights being a governmental function, in the absence of active wrongdoing, as here, there can be no recovery.

It is argued by the appellants that there was no obligation on the part of Camden to install this traffic light system and that by undertaking it, it in effect was engaged upon a private business enterprise in which the law cast upon it the same duties and obligations as upon individuals or private corporations. Allas v. Rumson, 115 N.J.L. 593, 181 A. 175, 102 A.L.R. 648, is relied on. That case is not in point, there the active wrongdoing consisted of faulty construction of the passageway.

There seems to be no case in this state where the facts are similar to the instant case, but respondent cites several cases from other jurisdictions. Auslander v. City of St. Louis, 332 Mo. 145, 56 S.W.2d 778, was a case of signal lights out of repair and it was held that maintenance of same was a governmental function and the municipality was not liable for negligent failure to correct defective signals. Parsons v. City of New York, 248 App.Div. 825, 289 N.Y.S. 198, held that the maintenance of traffic signals was a governmental duty and the city was not liable for injuries resulting from maintenance of defective signals "which showed a green light in four different directions simultaneously."

A case in which the facts are very similar to the instant case is Cleveland v. Town of Lancaster, 239 App.Div. 263, 267 N.Y.S. 673. It holds that where two towns erect a traffic signal and one maintains the same, the cost being divided, neither is liable for injuries caused by collisions at the intersection where the

lights failed to function properly, holding that they were exercising governmental functions and not for any private benefit of the corporate body.

The principle that municipalities are exempt from liability in the performance of governmental functions free from active wrongdoing is not disputed by the appellants. They rely on the contention that there was active wrongdoing under the testimony in the case.

With that we are not in accord.

The judgment of nonsuit was right and is affirmed, with costs.

Accord: Avey v. City of West Palm Beach, 152 Fla. 717, 12 So.2d 881 (1943). See also Joseph F. Murray, Jr., "Recent Trends in Municipal Tort Liability" 5 Leg.Notes on Loc.Govt. 353, 354 (1940). On the facts presented in the principal case were the streets being maintained in a reasonably safe condition? Or was the situation more accurately to be viewed as an instance of regulation of street use, which is a governmental function? See Tolliver v. City of Newark, 145 Ohio St. 517, 62 N.E.2d 357 (1945) and note 161 A.L.R. 1404 (1946). If the traffic signal were mounted on a structure erected in a street would that make a difference? See Murphy v. Incorporated Village of Farmingdale, 252 App.Div. 327, 299 N.Y.S. 586 (1937).

A distinction has been drawn where the unsafe condition of a public way was due to faulty construction. Maintenance has, by some courts, been considered ministerial but the adoption of plans for construction has been characterized as legislative and discretionary. To make this an avenue of escape no matter how defective the plan would present the practical absurdity of granting immunity as to seriously unsafe conditions arising out of original construction according to faulty plan. Thus, there has been some judicial disposition to deny immunity where a plan was plainly defective from the standpoint of public safety. Yackee v. Village of Napoleon, 135 Ohio St. 344, 21 N.E.2d 111 (1939).

Suppose an accident occurs during the course of repairing a public way? If a rule of liability has not been established by statute the governmental function pallium is likely to be employed to shield the local unit. City of Wooster v. Arbenz, 116 Ohio St. 281, 156 N.E. 210 (1927). Immunity was accorded in this case despite a statutory mandate to municipalities to keep streets in repair. To the layman it must be bizarre that a municipality is liable to Smith who was injured when his car crashed due to street disrepair but not to Jones who was run over by a

negligently-operated truck bringing materials to make the needed repairs. The distinction was effectively ignored in Sullivan v. City of Butte, 117 Mont. 215, 157 P.2d 479 (1945).

In the absence of statute, local units other than municipalities are not held responsible for the safe condition of public ways. Shirkey v. Keokuk County, 225 Iowa 1159, 275 N.W. 706 (1937); Smith v. Police Jury of St. Tammany Parish, 192 La. 214, 187 So. 553 (1939). For a discussion of the basis of this distinction see Borchard, op. cit. supra, 229–231. The moral for one destined to suffer a street accident is that he should have the presence of mind to have it occur within municipal corporate limits.

The fact that a public way lies within the geographical limits of a local unit is not determinative as to accountability in tort. The matter depends upon the factor of governmental jurisdiction and control. Brunacci v. Plains Township, 315 Pa. 391, 173 A. 329 (1934). Positive law may, of course, impose responsibility for maintenance upon a unit other than that which constructed the street or sidewalk. Strauch v. Town of Oyster Bay, 25 N.Y.S.2d 809 (N.Y.Sup.Ct.1941) (town responsible for maintenance of sidewalk in town laid by county along county road).

SECTION 3. STATUTORY DEVELOPMENTS

In the past, attacks made upon the problem of local government liability in tort through legislation have been largely piecemeal. The cumulative effect in some states has been to render the rule of liability applicable to the great majority of tort claims against municipalities and to extend the rule substantially with respect to other local units. The two most important sources of claims are accidents arising out of the condition of public ways and accidents involving the operation of motor vehicles of local units. The public ways area of municipal responsibility is, as we have seen, pretty well covered either by case law or statute. Only in certain states, however, has the necessary legislation to extend the rule of liability to other local units been enacted.

Careful attention to the language of a particular statute is necessary to determine its scope. Thus, the Ohio statute governing municipal care of public ways applies to "public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts." Ohio Gen.Code § 3714 (Page, 1938). Municipal parks and recreation grounds are "public grounds" within the meaning of this provision. Gaines v. Village of Wyoming, 147 Ohio St. 491, 72 N.E.2d 369 (1947); City of Cleveland v. Ferrando, 114 Ohio St. 207, 150 N.E. 747 (1926).

Statutes extending governmental liability with respect to negligent operation of motor vehicles are spotty. The California act is broad both as to governmental units and types of activities. Calif. Vehicle Code § 400 (Deering, 1948). Express authority is granted to carry liability insurance with any company authorized to conduct that type of insurance business in the state. Premiums are made a proper charge upon the general fund of the unit.

The Ohio law, on the other hand, is confined to municipalities and there are limitations in its provisions which materially limit its effect. Ohio Gen.Code § 3714-1 (Page, 1938). The statute applies only where the vehicle was being operated on a "public highway." It does not apply to the case where firemen are on duty at a fire or going to one or answering any emergency alarm. See Staudenheimer v. City of Newark, 62 Ohio App. 255, 23 N.E. 2d 845 (1939).

The New York statutory development is of unusual interest. That state has been a conspicuous leader in extending local government responsibility in tort both with respect to operation of motor vehicles and other matters. See Edwin Borchard, "Proposed State and Local Statutes Imposing Public Liability in Tort" 9 Law and Contemp. Prob. 282, 303-308 (1942), for a collection of New York statutes. Even so, these measures were piecemeal. Prior to the enactment of most of them the legislature had, in 1929, enacted a Court of Claims Act which broadly waived state immunity from suit in tort. N.Y.Laws 1929, c. 467, § 12-a. This was superseded in 1939 by a new act which, in sweeping terms, waived the state's immunity. New York Laws 1939, c. 860, § 8. For a favorable report upon this act and its administration see John W. McDonald, "The Administration of a Tort Liability Law in New York" 9 Law and Contemp. Prob. 262 (1942). This, very briefly is the legislative context of the landmark case of Bernardine v. City of New York, decided by the Court of Appeals in July, 1945.

BERNARDINE v. CITY OF NEW YORK

Court of Appeals of New York, 1945. 294 N.Y. 361, 62 N.E.2d 604.

Loughran, Judge. In this negligence action against the City of New York damages are demanded for personal injuries caused to the plaintiff by a runaway police horse. The parties waived a jury and the making of formal findings and introduced their respective proofs under a stipulation which empowered the trial court to grant "such decision as may be warranted by the facts."

Section 50-b of the General Municipal Law, Consol.Laws, c. 24, was invoked by the plaintiff. The substance thereof is a declaration of municipal liability for negligence of employees "in the operation of a municipally owned vehicle or other facility of transportation." As the Trial Judge saw it, however, this word "facility" signifies "inanimate means rather than human agencies" and consequently the "operation" of a horse was to his mind a thing not contemplated by the Legislature. 182 Misc. 609, 611, 44 N.Y.S.2d 881, 883. With the cited statute thus ruled out, the court was prevailed upon to dismiss the complaint on the single ground that recovery was barred by the City's common-law immunity from liability for wrongful performance of governmental duties.

On appeal by the plaintiff, the Appellate Division expressed the view that "a horse used, as this police horse concededly was, to facilitate transportation of a mounted policeman in the course of his duties, is 'a facility of transportation.' " 268 App.Div. 444, 447, 51 N.Y.S.2d 888, 891. Hence the City's claim of governmental privilege was rejected on the strength of section 50-b of the General Municipal Law, and the dismissal of the complaint was accordingly declared to be erroneous. This reversal was on the law, because, as we have indicated, the decision of the trial court had left the issues of fact wholly undetermined. Nevertheless, the Appellate Division did not order a new trial, but in lieu thereof made its own first-hand findings of fact in favor of the plaintiff and thereupon awarded him damages of \$12,500. The controversy is now before us on this appeal by the defendant City.

We believe the words of section 50-b of the General Municipal Law will safely bear the construction which the Appellate Division has here put upon them. After all, the horse did transport the police officer. In the face of that cogent fact, the average man—so we think—would scarcely resist the idea that the animal was a "facility" (i. e., an aid) in the passage of its rider,—a conclusion which we have the more readily reached by the light of the wholesome statutory purpose to do justice to persons who are damaged by the wrongs of public servants functioning as such. Cf. Sheehan v. North Country Community Hospital, 273 N.Y. 163, 7 N.E.2d 28, 109 A.L.R. 1197.

Even so, there was no compelling reason why this plaintiff should have taken his stand upon the above provision of the General Municipal Law. Section 8 of the Court of Claims Act says: "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corpora-

tion." The gist of this waiver and consent of the State has been operative since 1929, and is limited only by the incidental procedure prescribed in article II of the same Act. None of the civil divisions of the State-its counties, cities, towns and villageshas any independent sovereignty. See N.Y.Const. art. IX, § 9; City of Chicago v. Sturges, 222 U.S. 313, 323, 32 S.Ct. 92, 56 L. Ed. 215, Ann.Cas.1913B, 1349; Keifer & Keifer v. Reconstruction Finance Corporation, 306 U.S. 381, 59 S.Ct. 516, 83 L.Ed. 784. Cf. Gaglio v. City of New York, 2 Cir., 143 F.2d 904. The legal irresponsibility heretofore enjoyed by these governmental units was nothing more than an extension of the exemption from liability which the State possessed. Murtha v. New York Homeopathic Medical College & Flower Hospital, 228 N.Y. 183, 185, 126 N.E. 722. On the waiver by the State of its own sovereign dispensation, that extension naturally was at an end and thus we were brought all the way round to a point where the civil divisions of the State are answerable equally with individuals and private corporations for wrongs of officers and employees, even if no separate statute sanctions that enlarged liability in a given instance. Holmes v. Erie County, 291 N.Y. 798, 53 N.E.2d 369. Of course, the plaintiff in such a case must satisfy all applicable general statutory or charter requirements in the way of presentation of claims, notice of injury, notice of intent to sue and the like.

The plea which was most often made for the immunity of the civil divisions of the State was an assertion that officers and employees thereof—when engaged in the discharge of so-called governmental functions—acted as delegates of the State and not in behalf of any municipal master. Murtha v. New York Homeopathic Medical College & Flower Hospital, 228 N.Y. 183, 185, 126 N.E. 722. On that former basis, it is possible to suggest that the State has now laid itself open to suit for wrongs of officers or employees of its civil divisions. But any viewpoint of that kind would be vain, since the argumentation that had been contrived as a front for the doctrine of governmental immunity did not survive the renouncement of that doctrine. Cf. Miller v. New York City, 292 N.Y. 571, 54 N.E.2d 690.

As has already been observed, this case was validly tried by the court without a jury upon a stipulation for "such decision as may be warranted by the facts." All the propositions of fact that were in issue were fully litigated. Each party must be deemed to have moved for judgment in his favor. Civil Practice Act § 440. In that state of the record, we see no reason to doubt the power of the Appellate Division to grant the final judgment which in its conception was dictated by the weight of the evidence. Civil Practice Act, § 584; Lamport v. Smedley, 213 N.Y.

82, 106 N.E. 922. The City points to the absence from the order of the Appellate Division of any statement as to "whether or not the findings of fact below have been affirmed," as required by Civil Practice Act, section 602, subdivision 1. The reason for that omission is obvious: no findings of fact were made below in this instance. The power of the Appellate Division to render final judgment in a non-jury case like this was sanctioned by an amendment of the State Constitution adopted in 1925. York Mortgage Corporation v. Clotar Const. Corporation, 254 N.Y. 128, 172 N.E. 265. The enactment of the present section 602 of the Civil Practice Act in 1942 certainly was not an attempt to neutralize that important jurisdiction. As we see it, then, section 602 has no application to the present case.

To be sure, the Appellate Division has often made findings of fact in substitution of contrary reversed findings of a court below. But the competence of the Appellate Division to direct final judgment on a fresh fact basis extends beyond that precise situation. Bonnette v. Molloy, 209 N.Y. 167, 172, 102 N.E. 559, 561. deed, this Court of Appeals has in numerous cases dealt with new findings of the Appellate Division which did not touch the subject matter of the initial findings that were reversed. On the analogy of that practice, the original findings here made by the Appellate Division were, we think, quite in order and so we have reviewed the facts thereby adjudged. See N.Y.Const. art. VI, § 7; Civil Practice Act, § 605. It is not important to give the particulars of the accident. In our estimation, the decision of the Appellate Division is clearly in conformity with the preponderance of the proof. See 268 App.Div. 444, 448-450, 51 N.Y.S.2d 888, 891-894.

The judgment should be affirmed, with costs.

See also McCrink v. City of New York, 296 N.Y. 99, 71 N.E. 2d 419 (1947), discussed in 22 N.Y.Univ.L.Q.Rev. 509 (1947), and Steitz v. City of Beacon, 295 N.Y. 51, 64 N.E.2d 704 (1945). There is a dictum, by a divided court, in Rogers v. Board of Road Commissioners for Kent County, 319 Mich. 661, 30 N.W.2d 358 (1948), that the Michigan Court of Claims Act, as amended to waive state immunity, does not apply to counties.

A. MOB VIOLENCE STATUTES

In the domain of law enforcement and maintenance of public order, socialization of risks to individuals and to private property from mob action is a policy with roots deep in English history. See Allegheny County v. Gibson, 90 Pa.St. 397, 405 (1879) and Note 6 Ford.L.Rev. 270, 272n. (1937). American statutes imposing civil responsibility on local government for mob violence date from the middle of the nineteenth century. There is no common law liability. Shake v. Board of Commissioners of Sullivan County, 210 Ind. 61, 1 N.E.2d 132 (1936); Goldman v. Forcier, 68 R.I. 291, 27 A.2d 340 (1942). For collections of mob violence cases see Notes 13 A.L.R. 751 (1921); 23 A.L.R. 297 (1923); 44 A.L.R. 1137 (1926); and 52 A.L.R. 562 (1928).

The pertinent legislation of the twenty-odd states which have mob violence statutes varies widely. In some jurisdictions liability is imposed only on the county, in others only on the municipality, and in still others, on both. Some statutes permit recovery only for personal injuries, others simply for property damage and a third group for both. For references to statutes see Note 6 Ford.L.Rev. 270, 271 (1937).

Less than half of these statutes attempt to define a mob and they leave much room for interpretation except for the minimum number of five mob members exacted by a few. Liability is imposed without fault but active participation in the mob action, consent or negligence of the plaintiff may bar recovery. See N.Y.General Municipal Law § 71.

REYNOLDS v. LATHROP

Supreme Court of Ohio, 1938. 133 Ohio St. 435, 14 N.E.2d 599.

WILLIAMS, JUDGE. The sole query is whether the plaintiff was injured by an act of mob violence amounting to a lynching within the meaning of section 6278 and 6281, General Code.

These sections read:

Section 6278. "A collection of people assembled for an unlawful purpose and intending to do damage or injury to any one, or pretending to exercise correctional power over other persons by violence and without authority of law, shall be deemed a 'mob' for the purpose of this chapter. An act of violence by a mob upon the body of any person shall constitute a 'lynching' within the meaning of this chapter."

Section 6281. "A person assaulted and lynched by a mob may recover, from the county in which such assault is made, a sum not to exceed five hundred dollars; or, if the injury received therefrom is serious, a sum not exceeding one thousand dollars; or, if such injury result in permanent disability to earn a livelihood by manual labor, a sum not to exceed five thousand dollars."

These provisions were given a strict interpretation in Lexa v. Zmunt et al., Board of County Com'rs, 123 Ohio St. 510, 176 N.E. 82, and the general rule for recovery was laid down in the third paragraph of the syllabus: "To warrant a recovery under such statute it is not sufficient to show an injury resulting from the acts of a collection of people assembled for an unlawful purpose and intending to do damage or injury to some one, but there must appear also a purpose of exercising correctional power by violence and without authority of law."

The soundness of the ruling of the trial court turns upon the meaning of "correctional power."

On May 29, 1934, about midnight, plaintiff went to the door of his home in Toledo, Ohio, in response to a knock. As he opened the door he was seized by ten to twelve men; they pulled him out into his yard, and there kicked and beat him, and called him a "scab" a "strike breaker" and other names. At the time a strike prevailed at the plant of Electric Auto-Lite Company, a few blocks away, as it had for some time previously; but the plaintiff did not work there and was mistaken for some one who did. When the attackers discovered their mistake, they went away, leaving him quite seriously injured. This is a brief recital of the facts but amply sufficient to show the exact nature of the attack.

In contemplation of the statutory enactments affording recovery for lynching, an exercise of correctional power consists in an unlawful attempt by a mob to mete out justice by physical force and violence to a real or supposed wrongdoer without awaiting the action of the lawfully constituted authorities. It is immaterial whether a felony or misdemeanor has been committed or whether the victim of the assault is in custody of the law or whether a charge has been lodged against him. If the mob, in assaulting and injuring him, is attempting to administer justice with its own hands in the interest of the public good and is not acting for its own selfish or personal ends, then the assailants exercise correctional power by force and without authority of law.

In the instant case strife prevailed between the strikers and those opposing their demands. A group composed of persons sympathetic to the element supporting the strike attacked a supposed scab or strike breaker in the interest of the strikers. This conduct did not constitute the exercise of correctional power within the meaning of the statutes.

For the reasons given the judgment of the Court of Appeals is reversed, and that of the court of common pleas affirmed.

Judgment reversed.

In Portage Co-op. Creamery Ass'n v. Sauk County, 216 Wis. 501, 257 N.W. 614 (1934), the county was held liable for damages done by striking farmers in upsetting a milk collection truck belonging to the creamery association. The statute simply made a county liable for injury to person or property for mob or riot therein. See also Long v. City of Neenah, 128 Wis. 40, 107 N.W. 10 (1906).

It should be noted that the Ohio statute relates to an assemblage attempting to do injury to anyone "or pretending to exercise correctional power" over others. The statute was interpreted as though "or" read "and". The notion that a statute in derogation of the common law is to be strictly construed, born of the hostility of the English common lawyers to statutes, should long since have been quietly laid to rest. The maxim, ratio legis cedit, lex cedit, might serve as a fitting epitaph. The granted fact that the rule yet survives does not force us to a strained construction of a statute nor to disregard the countervailing canon that a remedial statute is to be liberally construed. As the Ohio law stands, the family of an actual murderer may (quite properly) recover from a local unit for his lynching but the family of a law-abiding citizen who meets a similar fate at the hands of a mob due to mistaken identity or unpopular political or social beliefs has no such recourse. On the contemporary scene mob action against unpopular minority elements and violence in industrial disputes provide the most likely material for claims under a mob violence statute, yet the Ohio law would extend to neither.

B. WORKMEN'S COMPENSATION

In the absence of statute the governmental-proprietary test has been applied in determining liability to employees of local government for injuries arising out of the employment. City of Bowling Green v. Bandy, 208 Ky. 259, 270 S.W. 837 (1925). Where municipal activity was considered ministerial or corporate the usual common law rules governing liability of the master have been applied.

In 1944 forty-six states had workmen's compensation laws which covered some or all public employees and over thirty of which applied to local as well as state employees. Leifur Magnus-

son, Workmen's Compensation for Public Employees 5–7 (Pub. Adm'n. Serv. No. 88, 1944). See also Dean A. Esling, "The Relationship between Municipal Employment and Workmen's Compensation" 21 Chi.-Kent L.Rev. 209 (1943). The majority of statutes applicable to local government are compulsory. In at least one state, Kansas, the law is elective as to hazardous employment (election not to come under act denies employer common law defenses) and otherwise voluntary (common law defenses not affected by choice). In Maine an otherwise compulsory act is elective as to towns. Several states extend the coverage only to hazardous employment.

Workmen's Compensation acts usually exclude elected officers. Appointive officials are excepted by some. Peace officers have generally been considered officers within the meaning of the statutory exception. Edwin O. Stene, "The Application of State Workmen's Compensation Laws to Public Employees and Officers" 17 Minn.L.Rev. 162 (1933). In Louisiana a policeman is an "official" for this purpose. Hall v. City of Shreveport, 157 La. 589, 102 So. 680 (1925).

If the given statute simply includes municipalities within the definition of "employer" does the act apply to governmental as well as proprietary functions? The Kentucky answer is "no". City of Bellevue v. Hall, 295 Ky. 57, 174 S.W.2d 24 (1943). See, in contrast, the authorities cited by Stene, op. cit. supra, at 166–167.

Provisions of workmen's compensation laws relating particularly to public employees call for the special attention of a student of local government law but, otherwise the public character of an employer will make little difference in the solution of such legal problems as may arise. Thus, questions as to whether the injury arose out of and in the course of the claimant's employment are not likely to be specially affected by the public or private character of the employer. City of Chicago v. Industrial Commission, 389 Ill. 592, 60 N.E.2d 212 (1945) (Risk of the street deemed risk of employment of license investigator making rounds on foot); Otto v. Independent School District, 237 Iowa 991, 23 N.W.2d 915 (1946) (Janitor who fell on icy sidewalk en route to work not injured in course of employment; five-to-four decision). For a wealth of case citations see McQuillin, Mun.Corps. § 2790 (Supp.1947). Concerning the once rather vexing question of the status of relief workers see Thelma Brook and Harold M. Simon, "Relief Workers and Workmen's Compensation" 36 Ill.L.Rev. 773 (1942).

C. CURRENT DEVELOPMENTS

The action of Congress in adopting the Federal Tort Claims Act (60 Stat. 842) in 1946 was a major step in establishing governmental responsibility in tort in this country. The act proceeds to waive immunity in general terms and then spell out twelve exceptions. The net effect is a very substantial extension of the area of liability. The heads of departments and agencies may adjust and settle claims of \$1000 or less but compromise and settlement after suit begun is made a function of the Attorney General subject to the approval of the court. Action may be prosecuted in a district court on a claim for any amount without jurisdictional minima. Experience thus far under the act provides no ground for concern that the Government will be flooded with non-meritorious claims or that the liabilities established will be financially onerous. See Comment 9 Ohio St.L.J. (1948). The act establishes a one-year period of limitations but contains no separate requirement as to prompt filing of notice of claim.

One of the principal difficulties in extending local government responsibility in tort has been the fear that ruinous tort liabilities might be established against small units. The available administrative studies do not bear this out. George A. Warp, "Tort Liability Problems of Small Municipalities" 9 Law & Contemp. Prob. 363 (1942). In order to allay the fears of those who would not accept Mr. Warp's conclusion, Professor Borchard has suggested that by statute a state fund be established, that local units with gross annual revenues from taxation of less than \$250,000 pay two per centum of those revenues into the fund in lieu of their liability under a general tort liability act and that the state assume any liability beyond the amount so contributed. Borchard, "Proposed State and Local Statutes Imposing Public Liability in Tort" 9 Law & Contemp. Prob. 282, 308 (1942). Perhaps it would be a more acceptable approach to leave liability unlimited and proceed on an insurance principle. If, as some have suggested, liability insurance coverage provided by private companies is too expensive, the alternative of a special state liability insurance plan for local units deserves consideration.

SECTION 4. ADMINISTRATIVE ASPECTS

"The law office of the municipality is almost necessarily the administrative center for the handling of tort claims. Unlike matters sounding in contract, where controllers and auditors may take the final role of arbiters, the tort claim is passed on to the law officer because of its indefiniteness, especially in personal injury cases. This indefiniteness arises because of the unliquidated character of the claim, and because tort liabilities are developed by case law rather than by statute law. The law officer weighs the probabilities of liability or non-liability and advises the disbursing authorities accordingly." Leon T. David and Patterson H. French, "Public Tort Liability Administration: Organization, Methods and Expenses" 9 Law & Contemp. Prob. 348-349 (1942).

"Law departments, even in small municipalities, play a dominant role in the administration of tort claims. In the great majority of cases, they are vested with what amounts to the final deciding authority. Their recommendations as to rejection, settlement, and litigation are seldom overruled. Indeed, most claimants apparently have no thought of prosecuting their claims beyond the administrative stage, for only about one seventh of them resort to litigation. It would seem that the greater number of claimants merely present their grievances and then stand by in the hope that the municipality, acting through its law department, will see that justice is done." George A. Warp, "Tort Liability Problems of Small Municipalities" 9 Law & Contemp. Prob. 363, 365 (1948). Rarely, however, is the local law officer empowered to take final action on a claim. He investigates and may conduct negotiations looking to a settlement but the local governing body, after receiving his recommendation, decides whether to allow the claim, compromise or reject it.

In large cities the volume of tort claims, especially where transportation and other utility facilities are operated, is such that the administration of tort claims has become highly specialized. Los Angeles with 400 square miles of area is a far cry from the village in which every accident becomes a matter of common knowledge. The big city can meet its problem only by organization, systematic administration and skillful handling of particular claims. Not uncommonly investigation and negotiation will be the responsibility of one division of the law department and all litigation of another. The investigators will have to support the litigation division, of course, if a claim reaches the law-suit stage. In Cleveland the municipal transit system is administered by a transit board which has a separate legal staff. Not unlike a great private utility, the transit system has a highly organized accident bureau. Its administration is under the general counsel. Within

the bureau are investigating, adjusting and medical sections. Oliver Schroeder, Jr., "Administration of Municipal Tort Liability in Cleveland" 9 Ohio St.L.J. 412 (1948).

Even the most efficient organization will be up against it unless notice of a claim is received while the event is still fresh. If notice is not required, the claimant may perfect his case immediately after the accident and then spring it upon the local unit just before the period of limitations expires. Recognition of this disadvantage has brought about the enactment in some thirty states of statutes which require the filing of notice of tort claims against municipalities (and, in some instances, other types of local units) within a limited period after the claims arose. For citations see Schroeder, op. cit. supra, at 429, and Henry S. Sahn, "Tort Notice of Claim to Municipalities" 46 Dick.L.Rev. 1 (1941). The period varies from ten days to six months. In Connecticut and Massachusetts only ten days are allowed for claims for injuries due to ice or snow, and longer periods for other claims. While, as Mr. Schroeder has stated, the courts have found in the notice statutes a number of objectives, the gist of the matter is that they attempt to place the local unit on a relatively equal footing with the claimant in developing the factual aspects of the claim. A number of these enactments apply only to claims based on the condition of public ways. Perhaps this is the type of case where the basis for notice is clearest since representatives of the unit are not likely to have been on the scene. It is important to the unit that there be time for investigation between filing of notice and institution of suit. That is why Section 244 of the New York Second Class Cities Law, for example, forbids the commencement of an action upon a claim until the expiration of three months after service of the notice.

NEUNSCHWANDER v. WASHINGTON SUBURBAN SANITARY COMMISSION

Court of Appeals of Maryland, 1946. 187 Md. 67, 48 A.2d 593.

Delaplaine, Judge. This suit was brought by Doris Neuenschwander in the Circuit Court for Prince George's County against Washington Suburban Sanitary Commission and the Mayor and City Council of Hyattsville to recover damages for injuries sustained on June 23, 1944, when she stepped upon the metal top of a sewer manhole along the sidewalk on Madison Street in Hyattsville. She alleged in her declaration that the metal top turned upwards, thrusting her left leg into the manhole, throwing her to the ground, and severely wrenching her body; and that she has suffered continuous pain, has spent large sums of money for medical and hospital treatment, and has been ad-

vised to undergo a surgical operation. She further alleged that the manhole was maintained negligently by defendants and was in an unsafe condition for pedestrians. Defendants pleaded that, because of the fact that they are municipal corporations, they are not liable for damages. Plaintiff demurred to the pleas, and the Court sustained the demurrers on the ground that the declaration failed to allege that defendants knew or should have known of the defective condition.

The law is established that a municipal corporation may be held liable for injuries caused by its negligence in failing to keep the streets and sidewalks under its control reasonably safe for travel in the ordinary manner, and in preventing and removing any nuisance affecting their use and safety. Cordish v. Bloom, 138 Md. 81, 85, 113 A. 578; Mayor and City Council of Baltimore v. Eagers, 167 Md. 128, 136, 173 A. 56; Mayor and City Council of Baltimore v. Thompson, 171 Md. 460, 189 A. 822. But a municipal corporation is not liable for injuries caused by the defective condition of a street, unless it is shown that it had actual or constructive notice of such condition. Constructive notice is such notice as the law imputes from the circumstances of the particular case. It is the duty of municipal authorities to exercise active vigilance over the streets to see that they are kept in a reasonably safe condition for public travel. After a street has been out of repair so that the defect has become known and notorious to those traveling the street, and there has been full opportunity for the municipality to learn of its existence and repair it through its agents charged with that duty, the law imputes notice to it and charges it with negligence. Keen v. Havre de Grace, 93 Md. 34, 48 A. 444; City of Annapolis v. Stallings, 125 Md, 343, 93 A. 974; Com'rs of Delmar v. Venables, 125 Md. 471, 476, 94 A. 89. But the declaration in a suit against a municipal corporation alleging injuries caused by a defect in a street need not expressly allege that the corporation had notice of the existence of such defect, for the charge of negligence implies a failure of the corporation to repair the street after actual or constructive notice of the need for such repair, and no such allegation is included in the form of declaration recognized by statute as sufficient in a case of this nature. Code 1939, art. 75, sec. 28(37); Washington, B. & A. Electric R. Co. v. Cross, 142 Md. 500, 505, 121 A. 374.

After the Court sustained the demurrers to the declaration, plaintiff filed an amended declaration. The first count was similar to the original declaration, but the second count alleged that defendants knew or, by the exercise of reasonable care, should have known of the dangerous condition of the manhole and metal top. In the meantime defendants learned that the Legisla-

ture of Maryland had passed an Act in 1943, applicable to Prince George's County, providing that no suit for damages shall be maintained against a municipal corporation unless written notice of the claim shall be presented within 90 days after the injury or damage is sustained. Defendants accordingly withdrew their pleas and filed demurrers alleging that plaintiff had failed to comply with the Act of 1943. The Act provides: "No action shall be maintained and no claim shall be allowed against any county or municipal corporation of Maryland, for unliquidated damages for any injury or damage to person or property unless, within ninety days after the injury or damage was sustained, written notice thereof setting forth the time, place and cause of the alleged damage loss, injury or death shall be presented either in person or by registered mail by the claimant, his agent or attorney, or, in case of death, by his executor or administrator, to the City Solicitor of Baltimore City, the County Commissioners, or the corporate authorities of the municipal corporation, as the case may be. The provisions of this section shall only apply to Caroline, Montgomery and Prince George's Counties." Acts of 1943, ch. 809, Code Supp.1943, art. 57, sec. 18.

On account of plaintiff's failure to allege compliance with the statute, the Court sustained the demurrers and entered judgment for defendants. It has been questioned on this appeal whether Washington Suburban Sanitary Commission is a municipal corporation within the contemplation of the Act. The word "municipal" is derived from "municipium," a city having the right of Roman citizenship, governed by its own laws in respect to local affairs but united to the republic by ties of sovereignty and general interest. Likewise in the early law of England, the term was applied to self-governing cities and towns. In later years, however, its application was extended to include the internal government of the State. So, a municipal corporation is now defined as a department of the government of the State. created by the Legislature with political powers to be exercised for the public welfare. Hence, this Court recognizes that the term "municipal corporation" is synonymous with "public corporation." Phillips v. City of Baltimore, 110 Md. 431, 438, 72 A. 902, 25 L.R.A., N.S., 711. In addition, the word "municipality" is frequently used as a synonym of "municipal corporation." Lease v. Upper Potomac River Commission, 179 Md. 543, 20 A.2d 498; 1 McQuillin, Municipal Corporations, 2d Ed., sec. 128. It is universally recognized that every municipal corporation is subject to absolute control by the Legislature. However great or small its sphere of action, it remains the creature of the State exercising privileges and powers subject to the sovereign will.

Johnson v. Luers, 129 Md. 521, 99 A. 710; City of Trenton v. State of New Jersey, 262 U.S. 182, 43 S.Ct. 534, 537, 67 L.Ed. 937, 29 A.L.R. 1471. The Maryland Legislature has declared the county commissioners of every county in the State to be a corporation (Code 1939, art. 25, sec. 1), and the Court of Appeals considers them to be a municipal corporation. Talbot County Com'rs v. Queen Anne's County Com'rs, 50 Md. 245, 259; Gordon v. Com'rs of Montgomery County, 164 Md. 210, 213, 164 A. 676; Maryland Racing Commission v. Maryland Jockey Club, 176 Md. 82, 87, 4 A.2d 124, 479. Compare Clauss v. Board of Education of Anne Arundel County, 181 Md. 513, 30 A.2d 779.

The attributes of a municipal corporation are possessed by Washington Suburban Sanitary Commission to an extent amply sufficient to bring it within that designation. It was created in 1918 by an Act of the Legislature, Laws 1918, c. 122, by which the members of the Commission were constituted a body corporate with authority to construct, maintain and operate systems for water supply, sewerage, drainage, and refuse collection and disposal in a designated sanitary district in Montgomery and Prince George's Counties. The Sanitary Commission has authority to appoint all employees necessary to carry out the purposes of the Act. It can purchase land and exercise the power of eminent domain. It is also empowered to issue bonds, and to determine the amount to be raised by taxation for its purposes in Montgomery and Prince George's Counties. It is expressly authorized to enter into contracts with the Commissioners of the District of Columbia or other Federal officials for the connection of its water supply, sewerage and drainage systems with those of the District of Columbia in order to obtain water by purchase from the District of Columbia or to dispose of the sanitary district's sewage and drainage. There is no question that the Legislature had authority to create this municipal corporation and to vest it with appropriate powers to carry on its work essential to the health and welfare of the people in the designated district. Dahler v. Washington Suburban Sanitary Commission, 133 Md, 644, 106 A. 10. Of course, if an agency is formed to operate a water supply or sewerage system merely as an auxiliary of a city or county government, it would not be a municipal corporation, because it is not vested with political powers. O'Leary v. Board of Fire & Water Com'rs of Marguette. 79 Mich. 281, 44 N.W. 608, 7 L.R.A. 170, 19 Am.St.Rep. 169. But a water supply or sanitary district is unquestionably a municipal corporation when it is incorporated by the Legislature and clothed with essential powers to serve as a separate department of the State. Gasaway v. North Branch Lake Fork Special Drainage District, 339 Ill. 103, 170 N.E. 721; Chicago &

Eastern Illinois R. Co. v. Sanitary District of Bloom Township, 350 Ill. 542, 183 N.E. 585; Sternberg v. Wakonda Drainage and Levee District, 7 Cir., 33 F.2d 451. We specifically hold that Washington Suburban Sanitary Commission is not deprived of its status as a municipal corporation by the fact that its territorial limits are embraced within the limits of Montgomery and Prince George's Counties. This status is analogous to those situations in Connecticut where a town is coterminous in territory with a city, and yet both the town and the association are held to be municipalities possessing individual, through somewhat interrelated, attributes and each exercising distinct powers and performing different duties. Sachem's Head Property Owners' Ass'n v. Town of Guilford, 112 Conn. 515, 152 A. 877.

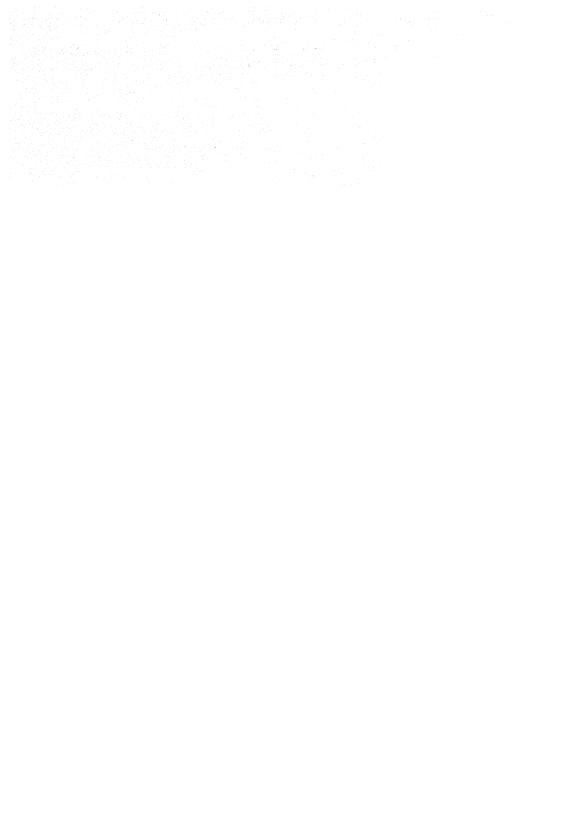
It is a fundamental doctrine that the Legislature may grant or deny to individuals a right of action against municipal corporations for injuries resulting from the negligent manner in which streets are maintained. When the Legislature creates a municipal corporation as part of the machinery of government of the State, it is within its province to adjust the relative rights of the corporation and the citizens. The Legislature has thus the power to enact a statute requiring that, before suit for damages shall be instituted against a municipal corporation, a written notice of the claim shall be presented to the municipal authorities within a specified period after injury or damage is sustained. Engle v. Mayor and City Council of Cumberland, 180 Md. 465, 470, 25 A.2d 446; MacMullen v. City of Middletown, 187 N.Y. 37, 79 N.E. 863, 11 L.R.A., N.S., 391. In order to maintain such an action, the declaration must allege that the notice prescribed by the statute was duly presented for the notice is a condition precedent to the right to maintain the suit. If the declaration does not contain such an allegation, the defendant can object either by demurrer or plea. Engle v. Mayor and City Council of Cumberland, 180 Md. 465, 469, 25 A.2d 446; Greenleaf v. Inhabitants of Norridgwock, 82 Me. 62, 19 A. 91; Forbes v. Town of Suffield, 81 Conn. 274, 70 A. 1023; Reinig v. City of Buffalo, 102 N.Y. 308, 6 N.E. 792; Daniels v. Racine, 98 Wis. 649, 74 N.W. 553.

Since the Act is constitutional, and plaintiff failed to allege that she presented the written notice as required by the Act, the judgment for defendants must be affirmed.

Judgment affirmed, with costs.

Where notice has actually been filed, there is reason for some indulgence as to the technical sufficiency of the notice so long as the substance is there. Smith v. Birmingham, 243 Ala. 124. 9 So.2d 299 (1942): Gannon v. Fitzpatrick, 58 R.I. 147, 191 A. 489 (1937); Duschaine v. City of Everett, 5 Wash.2d 181, 105 P.2d 18, 130 A.L.R. 134 (1940). A local unit might, but not in fairness, fail to notify a claimant of a material defect in his notice and "sit out" the filing period. There is authority that notice may not be waived. Hall v. City of Los Angeles, 19 Cal.2d 198, 120 P.2d 13 (1941): King v. City of Boston, 300 Mass. 377, 15 N.E.2d 191 (1938). Contra: Cole v. City of Seattle, 63 Wash. 1, 116 P. 257 (1911). Suppose the unit had received notice from other sources and made a prompt and complete investigation? The cases are divided on the question whether a notice of claim provision binds an infant. See Note 29 Calif.L.Rev. 243 (1941). Perhaps an exception is desirable, but is it permissible interpretation for a court to read an exception into an act? See Heyser v. Brown, 299 Ky. 82, 184 S.W.2d 893 (1945) (the opinion in this case contains a valuable collection of cases).

Once aware of a claim it is up to the unit as is true of large private organizations, through investigation (of the law department, co-operation of other departments, e. g.—police and street, in a city) and skillful negotiation, to deal with the claims submitted. As the studies noted at the outset of this chapter have disclosed, local policy varies as to settlement before suit. Boston has had a stiff attitude, Austin a liberal one. In any unit, geared to the task, whether large or small, much can be said for the liberal approach, since tort litigation is expensive, time-consuming and very unpredictable.



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